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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 146

CLIFTON MANUFACTURING COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1934

CERTIORARI GRANTED OCTOBER 8, 1934

SUPREME COURT OF THE UNITED STATES

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[fols. a & 1] Caption omitted

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA, SPARTANBURG DIVISION

At Law. No. 1498

CLIFTON MANUFACTURING COMPANY, a Corporation,

v.

THE UNITED STATES

PETITION

[fol. 2] To the District Court of the United States for the Western District of South Carolina, Spartanburg Division:

The plaintiff, Clifton Manufacturing Company, a corporation, respectfully shows to this Honorable Court and alleges:

1

That this petition is brought under Section 24(20) of the Judicial Code (28 U. S. C. Section 41(20)) to recover certain income and excess profits taxes and interest thereon, erroneously and illegally assessed and collected under the Internal Revenue Laws of the United States.

2

That at all times hereinafter mentioned the Plaintiff was and still is a domestic corporation organized and existing under the laws of the State of South Carolina, with its principal office and place of business at Clifton, Spartanburg County, in the Spartanburg Division of the Western District of South Carolina.

3

Defendant is indebted to Plaintiff in the principal sum of $162,805.61 with interest at 6% per annum on $1,665.96 from September 15, 1926 and on $161,139.65 from October 16, 1926.

Statutes Involved

4

The claim of Plaintiff here sued on is founded on the following statutes:

As to the statute of limitations, Revenue Act of 1918 (40 Stat. 1057), Sec. 250(d), Revenue Act of 1921 (42 Stat. 227), Sec. 250(d), Revenue Act of 1924 (43 Stat. 253), Sec. 277(a)(2), Sec. 278(d) and (e), Revenue Act of 1926 (44 Stat. 9), Sec. 277(a)(3), Sec. 278(d) and (e); as to re-[fol. 3] turns starting the running of the statute, Revenue Act of 1916 (as amended by Revenue Act of 1917) (39 Stat. 756, 40 Stat. 300), Sec. 13(b), Revenue Act of 1917 (40 Stat. 300), Sec. 212, Revenue Act of 1918 (40 Stat. 1057), Sec. 205(a), Sec. 200, Sec. 335(a), Sec. 300, Sec. 241(a), Sec. 227(a), Sec. 239(a), Sec. 336; as to effect of payment after expiration of statute of limitations, Revenue Act of 1928 (45 Stat. 795), Sec. 607.

5

The claim of Plaintiff here sued on is also founded in part upon Treasury Decision 2797, promulgated on the 11th day of March, 1919, which provides:

"If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the Revenue Act of 1917, and is subject to additional tax for the same period under the revenue act of 1918, the return covering such additional tax shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the original return and additional tax due under amended return, will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918."

Statement of Facts

6

On May 28, 1918 Plaintiff filed with the Collector of Internal Revenue for the District of South Carolina its income tax return on Form 1031 and its excess profits tax return on Form 1103, for the fiscal year ended March 31, 1918, both of which were duly executed and verified by Plaintiff in accordance with law.

[fol. 4] 7

The schedule which is attached to this petition marked "Exhibit A" sets forth the principal information which was contained in the income tax return, on Form 1031, referred to in Paragraph 6.

8

The schedule which is attached to this petition marked "Exhibit B" sets forth the principal information which was contained in the excess profits tax return, on Form 1103, referred to in Paragraph 6.

9

The income and excess profits taxes shown by said returns, referred to in Paragraph 6, amounting to $171,002.96, were paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina on September 11, 1918.

10

Pursuant to the requirement of Treasury Decision No. 2797 (dated March 11, 1919) Plaintiff on April 29, 1919 filed with the Collector of Internal Revenue for the District of South Carolina an amended income and profits tax return, on Form 1120, for the fiscal year ended March 31, 1918.

11

The amended return referred to in Paragraph 10 contained the same information with reference to the amount of net income and invested capital for the pre-war years (1911, 1912 and 1913), and the same information with

reference to the amount of invested capital for the fiscal year ended March 31, 1918, as was contained in the original income and profits tax returns, referred to in Paragraph 6. The amount of net income for the taxable year, the fiscal year ended March 31, 1918, was shown in the [fol. 5] amended return, referred to in Paragraph 10, to be the sum of $652,402.72, which sum was also shown to be the amount of net income subject to excess profits tax in the excess profits tax return referred to in Paragraph 6. The total net income shown to be subject to income tax on the income tax return referred to in Paragraph 6 was $652,525.30, which amount exceeded the amount shown as taxable net income in the amended return, referred to in Paragraph 10, by the sum of $122.58.

12

The said sum of $122.58, referred to in Paragraph 11, as the amount by which the item of taxable net income shown in the original income tax return referred to in Paragraph 6, exceeds the item of taxable net income shown in the amended return referred to in Paragraph 10, represented the amount paid by the taxpayer during the taxable year as interest on money borrowed for the purchase of Liberty bonds. This sum, with the explanation thereof, is shown in "Schedule 6" on the "Supplementary Statement" attached to the income tax return referred to in Paragraph 6. It also appears in "Schedule I" of the original excess profits tax return, referred to in Paragraph 6, that this amount of $122.58, representing interest paid on indebtedness incurred for the purchase of obligations of the United States issued since September 24, 1917, and held by the corporation in excess of $5,000.00 par value, was deducted from net income for the taxable year as shown in the original income tax return referred to in Paragraph 6, in order to arrive at the amount of net income subject to excess profits tax.

13

The amended return, referred to in Paragraph 10, showed an additional tax of $50,638.75 over and above the taxes shown on the original returns, referred to in Paragraph 6, which additional tax resulted solely from the application of the revised rates provided by the Revenue

Act of 1918, which was enacted after the original returns, referred to in Paragraph 6, were filed.

[fol. 6]

14

The additional tax in the sum of $50,638.75, referred to in Paragraph 13, was paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina, $13,690.65 on March 21, 1919 and $36,948.10 on September 15, 1919.

15

The original income and excess profits tax returns, referred to in Paragraph 6, were filed with the Collector of Internal Revenue for the District of South Carolina within the period provided by Section 241(a) and Section 227(a) of the Revenue Act of 1918 and Section 13(b) of the Revenue Act of 1916 and Section 212 of the Revenue Act of 1917.

16

The original income and excess profits tax returns, referred to in Paragraph 6, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912 and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918 and the Revenue Act of 1917 and the Revenue Act of 1916 as amended, provided that the items referred to should be accepted by the Commissioner as correct.

17

Said original income and excess profits tax returns, referred to in Paragraph 6, were prepared and filed by Plaintiff in good faith and in the honest belief that all the information therein contained was correct, and in particular that said returns accurately reflected all facts necessary to a proper computation of the income and excess profits taxes due by it for the fiscal year ended March 31, 1918, [fol. 7] including the items of gross income, deductions, credits, net income and invested capital for the fiscal year

ended March 31, 1918 and for the pre-war period (1911, 1912 and 1913).

18

All of the additional assessments referred to in the succeeding paragraphs were due to corrections made by the Commissioner of Internal Revenue in the income and invested capital reported in good faith by the Plaintiff in its original returns, referred to in Paragraph 6, and all of said additional assessments could have been made just as easily upon the basis of the figures contained in its original returns, referred to in Paragraph 6, as upon the basis of the figures contained in its amended return, referred to in Paragraph 10.

19

An additional assessment of $3,762.86 against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 was made by the Commissioner of Internal Revenue in June, 1919, and was paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina on June 16, 1919.

20

In May, 1921 the Commissioner of Internal Revenue assessed against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 an additional amount of $102,420.26.

21

On March 15, 1923 the sum of $1,124.35 was paid on account of the additional assessment, referred to in Paragraph 20, by means of the application of a credit of taxes overpaid by Plaintiff for the fiscal year ended March 31, 1917.

22

On May 25, 1926 the Commissioner of Internal Revenue [fol. 8] advised Plaintiff that he had finally determined that Plaintiff's income and excess profits tax liability for the fiscal year ended March 31, 1918 was $365,138.23, and in September, 1926 the Commissioner of Internal Revenue assessed against Plaintiff for the fiscal year ended March 31, 1918 an additional income and excess profits tax in the

principal sum of $37,313.46, and interest thereon of $1,174.61, or a total of $38,488.07.

23

On September 15, 1926 the sum of $1,665.96 was paid on account of the additional assessment, referred to in Paragraph 20, by means of the application of a credit of taxes overpaid by Plaintiff for the fiscal year ended March 31, 1917.

24

On September 24, 1926 the Collector of Internal Revenue for the District of South Carolina demanded of Plaintiff on account of said assessment in May, 1921, referred to in Paragraph 20, the sum of $99,629.95 principal, and interest thereon at 6% per annum from July 8, 1921 to September 24, 1926, in the sum of $31,147.32, making a total of $130,777.27.

25

The sums referred to in Paragraph 24 were paid by Plaintiff to said Collector under written protest, and under threat of distraint by said Collector, on October 15, 1926.

26

On September 28, 1926 said Collector demanded of the Plaintiff the amount of the additional assessment of principal and interest, referred to in Paragraph 22.

27

The sums referred to in Paragraph 26 and Paragraph 22 were paid by Plaintiff to said Collector under written [fol. 9] protest, and under threat of distraint by said Collector, on October 15, 1926.

28

On or about October 24, 1929 the Commissioner of Internal Revenue issued a certificate of overassessment in the sum of $7,877.78 principal, and $247.91 interest, or a total of $8,125.69, which sum, together with interest thereon, was refunded to plaintiff. Said refund was made out of, or with respect to, the additional assessment of principal and interest, referred to in Paragraph 22, which said assess-

ment was paid by Plaintiff to said Collector on October 15, 1926, as described in Paragraph 27.

29

The additional assessment, referred to in Paragraph 22, was made more than five years after Plaintiff's original income and excess profits tax returns, on Forms 1031 and 1103 respectively, for the fiscal year ended March 31, 1918 were filed, as stated in Paragraph 6, and after the statute of limitations had barred the right of the Commissioner of Internal Revenue to make such an assessment, and the collection on October 15, 1926 of $37,313.46 principal, and $1,174.61 interest, or a total of $38,488.07, as described in Paragraph 27, was made after the statute of limitations had barred the right of said Collector and the Government to make such collection.

30

The collection of additional income and excess profits taxes for the fiscal year ended March 31, 1918 in the sum of $99,629.95 principal, and interest thereon in the sum of $31,147.32, on October 15, 1926, as described in Paragraphs 24 and 25, was made after the statute of limitations had barred the right of said Collector and the Government to make such collection.

31

After deducting from the amounts of principal ($37,-[fol. 10] 313.46) and interest ($1,174.61), alleged in Paragraph 29 to have been collected after the expiration of the statute of limitations, the amounts of principal ($7,877.78) and interest ($247.91) refunded therefrom, as set forth in Paragraph 28, there remains a balance of $29,435.68, principal, and $926.70, interest, or a total of $30,362.38, which is refundable under Section 607 of the Revenue Act of 1928, together with interest thereon at 6% per annum from the date of payment, to-wit, October 15, 1926.

32

On September 19, 1928 Plaintiff filed with said Collector a claim for refund of the taxes here sought to be recovered. Copy of said claim for refund is attached hereto, marked "Exhibit C".

33

The claim for refund referred to in Paragraph 32 was rejected and disallowed by the Commissioner of Internal Revenue on October 24, 1929.

34

Anticipating the possibility of an attempted defense of "waiver" to the cause of action set out in the foregoing paragraphs, and without admitting the existence of any valid waivers which might afford even a defense at law to this action, Plaintiff in reply shows the following facts with reference to certain purported waivers, which facts would entitle Plaintiff to equitable relief against the use of said instruments by the Defendant in this action, if they should be held to constitute a valid defense at law.

35

On June 21, 1923, which was more than five years after the returns described in Paragraph 6 were filed by Plaintiff with the Collector of Internal Revenue for the District of South Carolina, the Commissioner of Internal Revenue, through his agents and assistants, to-wit, J. G. Bright, Act-[fol. 11] ing Deputy Commissioner, and John G. Remey, Chief of Section, addressed and sent a letter to Plaintiff enclosing a form of waiver and requesting the execution of said instrument by Plaintiff. Copy of said letter is attached to this petition and made a part hereof, marked "Exhibit D".

36

In said letter of June 21, 1923 the Commissioner of Internal Revenue by and through his agents represented to Plaintiff that the statute of limitations on assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had not yet expired, said representation being impliedly and obviously contained in the following language taken from the said letter, to-wit:

"Reference is made to the proposed additional assessment in the amount of $74,876.74 for the year 1918, as outlined in office letter dated March 5, 1923.

"You are advised that in order that the interests of the Government may not be jeopardized, pending consideration

of your brief dated March 15, 1923, you are hereby requested to fill out and properly execute the enclosed form of waiver and return the same to this office within thirty days from the date of this letter."

37

The representation described in the preceding paragraph was false and misleading, since the statute of limitations on assessment and collection of income and excess profits taxes against and from Plaintiff for Plaintiff's fiscal year 1918 had already expired, at the time said representation was made.

38

The false and misleading representation which the Commissioner of Internal Revenue made to Plaintiff, as described in the preceding paragraphs, was made with the in-
[fol. 12] tention and purpose of causing the Plaintiff or someone in its behalf to execute the so-called "Form of Waiver" which was enclosed with said letter.

39

The letter described in the preceding paragraphs, together with the so-called "Form of Waiver" which was enclosed therewith, was promptly received by Plaintiff; and relying upon the false and misleading representation contained in said letter as described above, and as a direct and proximate effect thereof, one J. C. Evins, President and Treasurer of Plaintiff, purported to execute on behalf of Plaintiff the so-called "Form of Waiver", which had been prepared by the Commissioner of Internal Revenue and which had been enclosed with the letter described above. Said purported waiver bears the date of June 25, 1923. Copy of said purported waiver is attached to this complaint, marked "Exhibit E".

40

Neither Plaintiff nor the said J. C. Evins nor any of Plaintiff's agents knew of the falsity of the representation described above; and Plaintiff and its officers, including the said J. C. Evins, by reason of Plaintiff's relations with the Commissioner of Internal Revenue and his assistants,

deputies and agents, were entitled to rely upon the representations of the Commissioner and his assistants, deputies and agents with reference to the assessability and/or collectibility from Plaintiff of income and excess profits taxes for the fiscal year ended March 31, 1918.

41

Assuming that neither the Government nor its officers nor agents knew of the falsity of said representation, the purported waiver which is described above was executed under a mutual mistake which existed in the minds of the officers and agents of both plaintiff and Defendant.

[fol. 13] 42

Said mutual mistake described in the preceding Paragraph was a mistake of fact (a mistake as to the expiration of the statutory period of limitation on assessment and collection of income and excess profits taxes), or at least a mistake concerning the parties' own antecedent and existing private legal rights, duties and/or liabilities, which said antecedent and existing private legal rights, duties and liabilities were to be affected by the execution of said instrument.

43

The mutual mistake described in the preceding Paragraphs was material; and but for said mutual mistake the said J. C. Evins would not have attempted or purported to execute said instrument on behalf of Plaintiff, and Plaintiff would not otherwise have executed or attempted to execute said instrument, and the purported execution of said instrument by the said J. C. Evins resulted solely and proximately from said mutual mistake.

44

As a result of the purported execution of said instrument on behalf of Plaintiff, Plaintiff received no consideration, benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistake.

45

The purported waiver described above was returned to the Commissioner of Internal Revenue by the said J. C.

Evins, with a letter, copy of which letter is attached hereto marked "Exhibit F".

46

On January 12, 1924, the Commissioner of Internal Revenue addressed and sent to Plaintiff another letter request- [fol. 14] ing Plaintiff to execute a second form of waiver which had been prepared by the Commissioner of Internal Revenue and which was enclosed with said letter of January 12, 1924, copy of which letter is attached hereto marked "Exhibit G".

47

Said so-called "Form of Waiver" described in the preceding paragraph was signed under date of January 19, 1924 by the said J. C. Evins, President and Treasurer of Plaintiff, and filed with the Commissioner of Internal Revenue under the circumstances described below. Copy of said purported waiver is attached hereto marked "Exhibit H".

48

On December 3, 1924, the Commissioner of Internal Revenue addressed and sent a letter to the Plaintiff requesting the Plaintiff to execute a third so-called "Form of Waiver", which said form had been prepared by the Commissioner of Internal Revenue and was enclosed with said letter of December 3, 1924, copy of which letter is attached hereto marked "Exhibit I".

49

Two copies of said so-called "Form of Waiver" described in the preceding paragraph were signed under date of December 4, 1924 by the said J. C. Evins, and filed with the Commissioner of Internal Revenue under the circumstances described below. Copies of said purported waivers are attached hereto marked "Exhibit J" and "Exhibit K".

50

Some time toward the end of the year 1925 the Commissioner of Internal Revenue requested that Plaintiff execute a fourth so-called "Form of Waiver", which had been prepared by the Commissioner. Said so-called "Form of

Waiver" was signed under date of November 18, 1925 by said J. C. Evins, President and Treasurer of Plaintiff, and [fol. 15] filed with the Commissioner of Internal Revenue under the circumstances described below. Copy of said purported waiver is attached hereto marked "Exhibit L".

51

The said J. C. Evins, President and Treasurer of Plaintiff corporation, purported to execute all four of said waivers described in Paragraphs 47, 49 and 50 above, on behalf of Plaintiff in reliance upon, and as a direct and proximate result of, the misrepresentation and mutual mistake described in Paragraphs 36 to 44 inclusive, and in reliance upon, and as a direct and proximate result of a further mistake, which said further mistake is described in the following Paragraph.

52

At the time of the execution of each of the four waivers described in Paragraphs 47, 49 and 50 above, Plaintiff and its officers and agents, including the said J. C. Evins, on the one hand, and the Commissioner of Internal Revenue and his deputies and assistants and agents on the other hand, mistakenly believed that the statute of limitations on assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had not yet expired, and they mistakenly believed that each of the preceding waivers described above had been validly obtained and executed, and they were ignorant of the voidability or invalidity of each or any of the preceding waivers.

53

But for said misrepresentation and mutual mistakes described in the two preceding Paragraphs, the said J. C. Evins would not have undertaken to execute said instruments referred to in Paragraphs 47, 49 and 50 above, or any one of them, on behalf of Plaintiff.

54

Plaintiff did not receive as a result of the purported [fol. 16] execution of any one of the four instruments described in Paragraphs 47, 49 and 50 any consideration,

benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistake.

55

Neither Plaintiff nor its officers or agents discovered the falsity of the representations described in Paragraphs 36 to 40 inclusive, above, nor did Plaintiff or its officers or agents become aware of the mutual mistake under which Plaintiff and the Government labored, as described in Paragraphs 41 to 44, inclusive, and in Paragraphs 51 and 52 above, until after the signing and filing by J. C. Evins, President and Treasurer of Plaintiff, of the last of the five instruments described in Paragraphs 39, 47, 49 and 50 above.

56

At the time of the filing and signing by J. C. Evins, President and Treasurer of Plaintiff, of each of the "Forms of Waiver" referred to in Paragraphs 39, 47, 49 and 50 above, none of said "Forms of Waiver" bore any signature on behalf of the Commissioner of Internal Revenue, and Plaintiff makes no admission as to the genuineness of the purported signature of the Commissioner appearing thereon, or the date it was affixed, or the authority of the party who might have affixed it on behalf of the Commissioner; and if any of the preceding "Forms of Waiver" had not been properly executed on behalf of the Commissioner of Internal Revenue at the time the later "Forms of Waiver" referred to in Paragraphs 47, 49 and 50 were signed and filed by J. C. Evins, President and Treasurer of Plaintiff, Plaintiff and the said J. C. Evins were ignorant of that fact.

57

The said J. C. Evins, President and Treasurer of Plaintiff, had no authority to execute any one of the five instruments described in Paragraphs 39, 47, 49 and 50 above, at the time he undertook to execute said instruments on behalf of Plaintiff. No express authority was given to the [fol. 17] said J. C. Evins by Plaintiff or its board of directors to execute any one of said instruments in Plaintiff's name, and said J. C. Evins had no implied authority for such action by virtue of his office, course of dealing or any acts or omissions of the Plaintiff, for the reason that

the statute of limitations applicable to assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had already expired when the first of said instruments was executed, and for the further reason, with reference to the four instruments described in Paragraphs 47, 49 and 50, that the preceding alleged waiver or waivers, each and all of them, were void or voidable and could not therefore be used to defeat the rights which had accrued to Plaintiff from the expiration of the statute of limitations.

58

Plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

59

No part of said claim of $162,805.61 and interest due Plaintiff thereon has ever been assigned or transferred by Plaintiff, and Plaintiff is entitled to the entire amount thereof after allowing all just credits and offsets due to the United States. Plaintiff believes the facts as stated in this petition to be true.

Wherefore, Plaintiff prays judgment against the United States for the sum of $162,805.61, or such other amount or amounts as the Court may find to be due, representing income and profits taxes assessed and/or collected after the running of the statute of limitations, as above set out, together with interest from the dates of payment at the rate of 6% per annum, as provided by law, together with the costs of this suit, and further prays that in the event all or any one of the five instruments described in Paragraphs 39, 47, 49 and 50 should be found to constitute a defense in [fol. 18] law to this action, the Court decree that they and each of them are void, and that they cannot be employed by Defendant as a defense to this action, and for such other and further relief as may be necessary or proper.

Clifton Manufacturing Company, by (Sgd.) J. C. Evins, President and Treasurer. Sutherland & Tuttle, Atlanta, Georgia; Horace L. Bomar, Spartanburg, South Carolina, Attorneys for Plaintiff.

Duly sworn to by J. C. Evins. Jurat omitted in printing.

[fol. 19] EXHIBIT "A" TO PETITION

Form 1031 (Revised January, 1918)—United States Internal Revenue

Corporation Income Tax Return

* * * * * * *

Return of annual net income for the fiscal year ended March 31, 1918.

Name of corporation: Clifton Manufacturing Company.

Principal office: Clifton, South Carolina.

Kind of business carried on: Manufacture of cotton goods.

Date of organization: 1880.

1. Total amount of paid up capital stock outstanding at the close of the year, or if there is no capital stock the capital other than interest bearing indebtedness employed in the business at the close of the year. Unissued or treasury stock must not be included in this item, but only stock actually issued and outstanding at the close of the year for which this return is made.

(a) Paid up "common stock"	$1,000,000.00
(b) Paid up "Preferred Stock"	
Total paid up stock	$1,000,000.00

2. Total amount of bonded or other interest bearing indebtedness outstanding at the close of the year, exclusive of indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the Company and exclusive also of indebtedness incurred in the purchase of securities, the income from which is not subject to income tax.

Character of Obligation:

Notes to Banks etc. for money borrowed:

Rate of interest	6 and 7%
Principal	$400,282.00
Total Indebtedness	$400,282.00

[fol. 20] Income

3. (a) Gross sales and other income from operations	$3,550,443.03
(b) Income from rentals, royalties, etc	10,096.91
(c) Income from interest	.....
(d) Income from dividends	.....
(e) Income from other sources (See Item 3 (e) on back)	8,258.28
Total gross sales and other income	$3,568,798.22
Less Total Deductions	2,916,272.92
8. Total net income	$652,525.30
Less:	
(a) Excess profits tax (Item 12)	140,267.49
9. (a) Amount taxable at 2%	$512,257.81
10. Amount of total net income shown in Item 8	652,525.30
Less Excess profits tax	140,267.49
11. Amount taxable at 4%	$512,257.81

Deductions

4. (a) Cost of goods and other property sold	$2,589,687.98
(b) Expenses, general	174,022.67
5. (a) Losses sustained charged off	None
(b) Depreciation charged off	86,800.00
(c) Depletion charged off	None
6. (a) Interest paid	51,578.63
(c) Interest paid on indebtedness wholly secured by collateral	None
7. (a) Domestic Taxes paid, not including income and excess profits taxes	14,183.64
(b) Foreign taxes paid	None
Total Deductions	2,916,272.92

[fol. 21] Tax

12. Amount of excess profits tax	$140,267.49
13. Amount of 2% tax	10,245.16
14. Amount of 1% tax	None
15. Amount of 4% tax	20,490.31
16. Total tax assessable	$171,002.96

We, the undersigned, president and treasurer of the above named Company, whose return of net income is hereby set forth being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief true and correct in each and every particular.

(Sgd.) J. C. Evins, President. (Sgd.) D. K. Anderson, Sect.

Sworn to and subscribed before me this 25 day of May 1918. (Sgd.) H. K. Osborne, Notary Publ. S. C. (Seal.)

* * * * * * *

Supplementary Statement

* * * * * * *

3. (e) From other sources.

Income received from all sources not elsewhere specified should be itemized below:

Merchandise stores, net profit	$5,804.54
Farm, net profit	2,453.74
Total	$8,258.28

[fol. 22] 4. (a) Cost of goods and other property sold.

Report the cost of goods sold in the following form:

Merchandise bought for sale	.....
Cost of manufacturing or otherwise producing goods	$2,318,717.94
Plus inventories at beginning of year	99,585.89
Total	$3,310,303.83
Less inventories at end of year	720,615.85
Net cost of goods sold	$2,589,687.98

* * * * * * *

EXHIBIT "B" TO PETITION

Form 1103—United States Internal Revenue

Corporation Excess Profits Tax Return, Taxable Year Ended March 31, 1918

Name: Clifton Manufacturing Company.
Business Address: Clifton, South Carolina.
Kind of Business: Manufacturing Cotton Goods.
Date Established: 1880.

* * * * * * *

Schedule I—Net Income for Taxable Year Subject to Excess Profits Tax

1. Net income for taxable year shown in Item 8, Form 1031	$652,525.30
2. Plus interest on obligations of the United States issued since September 24, 1917, held by corporation in excess of $5,000.00 par value	.....
3. Total	$652,525.30
4. Less (a) Dividends received	.....
5. (b) Interest paid (not in excess of legal limit) on indebtedness incurred for purchase of obligations reported in Item 2 above	122.58
6. Net income subject to excess profits tax	$652,402.72

[fol. 23] Schedule II—Invested Capital

Item	1911	1912	1913	Taxable Year
1. Capital, surplus, and undivided profits at close of the preceding year as shown by Corporation's books before making any adjustments therein (From Schedule A).....	1,477,971.76	1,614,575.31	1,717,137.14	1,939,857.07
2. Adjustments by way of additions (From Schedule B).....	356,590.03	356,590.03	356,590.03	356,590.03
3. Total.....	1,834,561.79	1,971,165.34	2,073,727.17	2,296,447.10
4. Adjustments by way of deductions (From Schedule C).....	.....	.....	.....	.....
5. Invested Capital at beginning of year (Item 3 less Item 4)....	.....	.....	.....	2,296,447.10
6. Changes in invested capital during year (From Schedules D and E)..	.....	.....	.....	.....
7. Invested capital for year.....	1,834,561.79	1,971,165.34	2,073,727.17	2,296,447.10
8. Total invested capital for pre-war period.....	.....	.....	.....	5,879,454.30

* * * * * * *

[fol. 24] Schedule A—Capital Surplus and Undivided Profits as Shown by Books Before Making Any Adjustments Therein

* * * * * * *

Item	1911	1912	1913	Taxable Year
Capital stock paid up and actually outstanding at the close of the preceding year (not including treasury stock):				
1. First preferred	300,000.00	300,000.00	300,000.00	.....
2. Second preferred	.....	.....	.....	.....
3. Common	1,000,000.00	1,000,000.00	1,000,000.00	1,000,000.00
4. Total	1,300,000.00	1,300,000.00	1,300,000.00	1,000,000.00
Surplus and undivide profits:				
5. Paid in surplus	.....	.....	.....	.....
6. Earned surplus	.....	.....	.....	.....
7. Undivided profits	177,971.76	314,575.31	417,137.14	939,857.07
8. Grand total of Items 4, 5, 6 and 7	1,477,971.76	1,614,575.31	1,717,137.14	1,939,857.07

[fol. 25] Schedule B—Adjustments by Way of Additions

* * * * * * *

Item	1911	1912	1913	Taxable Year
3. Additions to capital account allowable under Article 64	356,590.03	356,590.03	356,590.03	356,590.03

* * * * * * * *

Schedule F—Net Income During Pre-War Period

Item	1911	1912	1913
1. Net income for year as reported on income tax return	33,568.30	215,585.32	143,737.51
2. Plus amount of federal income tax paid during year	22.73	2,455.12	1,116.80
3. Total for each year	33,591.03	218,040.53	144,854.31
4. Less amount of dividends received in 1913	.....	.....	.....
5. Net total for year 1913	.....	.....	144,854.31
6. Grand total for pre-war year	.....	.....	396,485.87

* * * * * * *

We, the undersigned, president and treasurer of the above-named company, being severally duly sworn, each for himself deposes and says that the foregoing return, including the accompanying schedules and statements (if any), has been examined by him and is to the best of his knowledge and belief a true and complete return made in [fol. 26] good faith pursuant to the Excess Profits Tax Regulations.

J. C. Evins, Pres. D. K. Anderson, Sect.-Treasurer.

Sworn to and subscribed before me this 25 day of May, 1918. (Sgd.) H. K. Osborne, Notary Public, S. C. (Seal.)

EXHIBIT "C" TO PETITION

Treasury Department, Internal Revenue Service

Form 843

Claim for Refund of Taxes Illegally Collected

STATE OF SOUTH CAROLINA,
County of Spartanburg:

(Name of Taxpayer:) Clifton Manufacturing Company.
(Business Address:) Clifton, South Carolina.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Manufacturers of Cotton Cloth (From April 1, 1917).

2. Character of assessment or tax: (To March 31, 1918).

3. Amount of assessment or stamps purchased: $365,-138.23 plus 32,321.93 int.

[fol. 27] 4. Reduction of Tax Liability requested (Income and Profits Tax): —.

5. Amount to be abated: —.

6. Amount to be refunded (or such greater amount as is legally refundable): $175,000.00.

7. Dates of payment (See Collector's receipts or indorsements of canceled checks): $225,404.57—1918-1919. Prin. $99,629.95 int. 31,147.32. 10/5/26. Prin. $37,313.46 int. 1,174.61 Oct. 8, 1926.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: Columbia Division.

9. District in which unpaid assessment appears: South Carolina.

10. Amount of overpayment claimed as credit:

11. Unpaid assessment against which credit is asked; period from —— Deponent verily believes that this application should be allowed for the following reasons:

1. Commissioner erred in disallowing Taxpayer's claim that its inventory be taken at cost or market whichever is lower instead of at cost, thus overstating taxpayer's income for the year 1919.

2. All of the amounts collected in October 1926 were collected more than five years after taxpayer's original return for the fiscal year ended after March 31, 1918 had been filed and after the Statute of Limitations on collection of said amounts had become operative.

3. The tax collected on Oct. 8, 1926 as above stated was assessed more than five years after taxpayer's original return for the fiscal year ended March 31, 1918 had been filed [fol. 28] and after the Statute of Limitations on said assessment had become operative.

Clifton Manufacturing Company. (Sgd.) J. C. Ivins, Treasurer. (Seal.)

Sworn to and subscribed before me this 19th day of Sept., 1928. (Sgd.) James M. Oeland, N. P. for S. C. (Seal.)

EXHIBIT "D" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

June 21, 1923.

Address reply to Commissioner of Internal Revenue, and refer to IT:CA:M-2RJR-2112-11.

Clifton Manufacturing Company, Clifton, South Carolina.

SIRS: Reference is made to the proposed additional assessment in the amount of $74,876.74, for the year 1918, as outlined in office letter dated March 5, 1923.

You are advised that in order that the interests of the Government may not be jeopardized, pending consideration of your brief dated March 16, 1923, you are hereby requested to fill out and properly execute the enclosed form [fol. 29] of waiver and return the same to this office within thirty days from the date of this letter.

In your letter of transmittal, reference should be made to IT:CA:M-2-RJR-2112-11.

Respectfully, J. G. Bright, Acting Deputy Commissioner, by (Sgd.) John G. Remey, Chief of Section.

Enclosure: Form of Waiver.

EXHIBIT "E" TO PETITION

(872M.)
IT:CA:M-2.
2112: RJR 11.
(23.)

Clifton, S. C.,
June 25, 1923.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Clifton Mfg. Co., of Clifton, S. C. and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Clifton Mfg. Co. for the years 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

Clifton Mfg. Co., Taxpayer (Seal), by (Sgd.) J. C. Evins, Pres. & Treas, (Sgd.) D. H. Blair, Commissioner.

[fol. 30] If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the cor-

poration as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

EXHIBIT "F" TO PETITION

Clifton Manufacturing Company, Cotton Mills, Clifton, S. C.

Address All Communications To Clifton, S. C.

June 25, 1923.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: Replying to yours of the 21st inst. IT:CA:M-2-RJR-2112-II, as requested we have signed and herewith return waiver covering the adjustment of additional taxes assessed against Clifton Mfg. Co. for the year 1918.

Very truly yours, (Sgd.) J. C. Evins, Pres.

EXHIBIT "G" TO PETITION

Jan. 12, 1924.

IT:CA:M.
MWH-2100-12-App.

Clifton Manufacturing Company, Clifton, South Carolina.

SIRS: Reference is made to your briefs dated March 16, [fol. 31] 1923 and April 6, 1923, protesting against the proposed additional tax for the years 1917 to 1919, inclusive, in the net amount of $28,864.66, as outlined in office letter to you dated March 5, 1923.

You are informed that before your briefs can be given further consideration, it will be necessary for you to execute and return to this office immediately, the enclosed form of waiver, covering the fiscal years ended March 31, 1917 and March 31, 1918, properly signed by two of the principal officers of the corporation, and the corporate seal affixed thereto.

In the event that you fail to take action as above outlined within ten days from the date of this letter, the additional

taxes, disclosed by office letter dated March 5, 1923, for the years 1917 to 1919, inclusive, will be immediately assessed.

If waivers are not furnished within the time prescribed, and the assessment is placed upon the list, payment thereof should be made promptly upon receipt of notice and demand from the Collector of Internal Revenue for your district, as the provisions of Section 250(d) of the Revenue Act of 1921 and Article 1006 of Regulations 62, deny to a taxpayer the privilege of filing a claim for abatement under such circumstances.

Please give this matter your prompt attention, referring in your reply to IT:CA:M MWH-2100-12-App.

Respectfully, J. G. Bright, Deputy Commissioner, by —— ——, Chief of Section.

Enclosures: 2 Waiver Forms.

lfc-5.

[fol. 32] EXHIBIT "H" TO PETITION

1/19/24.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, the Clifton Manufacturing Company, of Clifton, S. C., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said corporation for the fiscal year ended March 31, 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

Clifton Manufacturing Company, Taxpayer (Seal), (Sgd.) J. C. Evins, Pres. & Treas. (Sgd.) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 33] EXHIBIT "I" TO PETITION

Treasury Department, Internal Revenue Bureau

Income Tax-Form 7768.
Dec., 1921 c2-11662.
IT:E:SM.
TGF-14149.
A-14150.
B-14151.

Dec. 3, 1924.

Clifton Manufacturing Company, Clifton, South Carolina.

SIRS: Reference is made to your income and profits tax returns for the fiscal years ended March 31, 1917, 1918 and 1919 and to your application for assessment under the provisions of Sections 210 and 328 of the Revenue Acts of 1917 and 1918.

Inasmuch as the audit of your case, under the above mentioned provisions, is practically completed and the waivers now on file do not give sufficient time to comply with the provisions of Section 274(a) of the Revenue Act of 1924, it is requested that the enclosed waiver forms for the taxable years 1917, 1918 and 1919 be properly executed and returned to this office within ten days from the date of this letter.

In your letter of transmittal please refer to the symbols IT:E:SM:TGF-14149, A-14150, B-14151.

Respectfully, J. G. Bright, Deputy Commissioner.
By (Sgd.) I. T. Enes, Chief of Section.

EP-6
Enclosures:
Waiver forms.

[fol. 34] EXHIBIT "J" TO PETITION

As Amended 1924.
IT:E:SM.
TGF-14149.
A-14150.
B-14151.

Clifton, S. C.,
Dec. 4, 1924.

Income and Profits Tax Waiver.

In pursuance of the provisions of existing Internal Revenue Laws, Clifton Manufacturing Company a taxpayer of Clifton, South Carolina and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years March 31, 1917, 1918 and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

Clifton Mfg. Co., Taxpayer (Seal), by (Sgd.) J. C. Evins, Treas. (Sgd.) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 35] EXHIBIT "K" TO PETITION

(1435M.)
As amended 1924.

December 4, 1924.

Income and Profits Tax Waiver

In pursuance of the provisions of existing Internal Revenue Laws, Clifton Manufacturing Company a taxpayer of Clifton, South Carolina, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918 and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by Section 277(b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

Clifton Manufacturing Company, Taxpayer (Seal).
by (Sgd.) J. C. Evins, Treas. (Sgd.) D. H. Blair,
Commissioner. BB.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 36] EXHIBIT "L" TO PETITION

Treasury Department, Internal Revenue Service

Form 872A.

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922

November 18th, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Clifton Manufacturing Company, a taxpayer of Clifton, South Carolina, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the fiscal years ended March 31, 1917, 1918 and 1919 under existing revenue acts, or under the prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Clifton Manufacturing Company, Taxpayer (Seal),
by (Sgd.) J. C. Evins, Pres. & Treas. (Sgd.)
D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addi-
[fol. 37] tion to which, the seal if any, of the corporation must be affixed.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION

SIRS: Please take notice that the within petition was duly filed with the Clerk of the District Court of the United States for the Western District of South Carolina on the 13th day of October, 1931, which Court has jurisdiction of the cause therein set forth, and in which District the Plaintiff resides.

Spartanburg, South Carolina, October 13th, 1931.

(Sgd.) Horace L. Bomar, Attorney for Plaintiff, Spartanburg, South Carolina.

To the Honorable the Attorney General of the United States and to the Honorable the Attorney of the United States for the Western District of South Carolina.

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 38] AFFIDAVIT OF SERVICE

Personally appeared before the undersigned Horace L. Bomar, who being first duly sworn, deposes and says that he is the Attorney for the Plaintiff in the foregoing suit and that on October 13th, 1931 he personally served on Joseph A. Tolbert, United States District Attorney for the Western District of *North* Carolina, at his office in Greenville, South Carolina, the within contained notice and copy of petition, and that on said October 13th, 1931 he thereupon mailed a copy of said notice and petition to the Attorney General of the United States at Washington, all in the form and manner as required by law.

(Sgd.) Horace L. Bomar, Attorney for Plaintiff.

Sworn to and subscribed before me this 13th day of October, 1931. (Sgd.) Davis C. Durham, Notary Public for S. C. (Seal.)

I hereby acknowledge service of the within contained notice and copy of petition.

This 13 day of October, 1931.

(Sgd.) Joseph A. Tolbert, United States Attorney, Western District of South Carolina.

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 39] AMENDMENT TO PETITION

Now comes the plaintiff in the above entitled cause and, with leave of court first had and obtained, amends its petition heretofore filed by adding after Paragraph 59, and before the prayer for relief, the following new paragraph as Paragraph 60:

"60

"The Collector of Internal Revenue by whom the taxes, interest and sums referred to in Paragraphs 9, 14, 19, 21, 23, 25 and 27 were collected, and to whom said taxes, interest and sums were paid, had ceased to hold said office of Collector of Internal Revenue at the time this suit was commenced."

(Sgd.) Joseph B. Brennan, (Sgd.) W. A. Sutherland, Attorneys for Plaintiff.

Order

The foregoing amendment read and considered. The same is allowed subject to demurrer.

This 22 day of January, 1932.

(Sgd.) H. H. Watkins, United States Judge.

I consent:

Joseph A. Tolbert, U. S. Atty.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO PETITION

[fol. 40] Now comes the Plaintiff in the above entitled cause, and with leave of Court first had and obtained,

amends the petition heretofore filed in the following respects:

1

Paragraph 43 of the petition is amended so as to read as follows:

"43. The mutual mistake and misrepresentation described in the preceding paragraphs were material; and but for said mutual mistake and misrepresentation the said J. C. Evins would not have attempted or purported to execute said instrument on behalf of Plaintiff, and Plaintiff would not otherwise have executed or attempted to execute said instrument, and the purported execution of said instrument by the said J. C. Evins resulted solely and proximately from said mutual mistake and misrepresentation."

2

Paragraph 51 of the original petition is amended so as to read as follows:

"51. The said J. C. Evins, President and Treasurer of Plaintiff Corporation, purported to execute all four of said waivers described in paragraphs 47, 49 and 50 above, on behalf of Plaintiff, in reliance upon, and as a direct and proximate result of, the misrepresentation and mutual mistake described in paragraphs 36 to 44, inclusive, and in reliance upon, and as a direct and proximate result of further mistakes and misrepresentations, which said mistakes and misrepresentations are described in the following paragraphs."

3

Paragraph 52 of the original petition is amended so as to read as follows:

"52. At the time of the execution of each of the four waivers described in paragraphs 47, 49 and 50 above, Plaintiff and its officers and agents, including the said J. C. [fol. 41] Evins, on the one hand, and the Commissioner of Internal Revenue and his Deputies, Assistants and Agents, on the other hand, mistakenly believed that the statute of

limitations on assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had not expired, and they mistakenly believed that each of the preceding waivers described above had been validly obtained and executed, and they were ignorant of the voidability or invalidity of each or any of the preceding waivers. Each of the four waivers described in paragraphs 47, 49 and 50 above, were also procured from Plaintiff by means of misrepresentations, which are more fully described in the following sub-paragraphs:

"(a) In the letter of January 12, 1924 (Exhibit G attached to the petition) in which the purported waiver of January 19, 1924 (Exhibit H attached to the petition) was requested, the Commissioner of Internal Revenue, through his Agents, and Assistants, to-wit, J. G. Bright, Acting Deputy Commissioner, and John G. Remey, Chief of Section, represented to Plaintiff that the statute of limitations had not yet expired, said representation being contained in the following language taken from said letter:

You are informed that before your briefs can be given further consideration, it will be necessary for you to execute and return to this office immediately, the enclosed form of waiver, covering the fiscal years ended March 31, 1917 and March 31, 1918, properly signed by two of the principal officers of the corporation, and the corporate seal affixed thereto.

In the event that you fail to take action as above outlined within ten days from the date of this letter, the additional taxes, disclosed by office letter dated March 5, 1923, for the years 1917 to 1919, inclusive, will be immediately assessed.

"(b) The representation described in sub-paragraph (a) was false and misleading since the statute of limitations on assessment and collection of income profits taxes for Plaintiff's fiscal year ended March 31, 1918 had expired and the waiver then on file (Exhibit E attached to the petition) was invalid, at the time said representation was made.

[fol. 42] "(c) In the letter of December 3, 1924 (Exhibit I attached to the petition) in which the purported waiver of December 4, 1924 was requested, the Commissioner of Internal Revenue, through his Agents and Assistants, to-wit, J. G. Bright Deputy Commissioner, and I. T. Enes, Chief of Section, represented to Plaintiff that the statute of

limitations (or the statute as extended by prior waivers) had not yet expired, said representation being contained in the following language taken from said letter:

Inasmuch as the audit of your case, under the above mentioned provisions, is practically completed and the waivers now on file do not give sufficient time to comply with the provisions of Section 274 (a) of the Revenue Act of 1924, it is requested that the enclosed waiver forms for the taxable years 1917, 1918 and 1919 be properly executed and returned to this office within ten days from the date of this letter.

"(d) The representation described in sub-paragraph (c) was false and misleading since the statute of limitations on assessment and collection of income and profits taxes for Plaintiff's fiscal year ended March 31, 1918 had already expired and the waivers then on file (Exhibit E and Exhibit H attached to the petition) were invalid at the time said representation was made.

"(e) The purported waiver dated November 18, 1925 (Exhibit L attached to the petition) was requested from Plaintiff by one Leo Speer, of the Office of the General Counsel, Bureau of Internal Revenue, at a conference in November 1925, upon the representation by said Speer, on behalf of the Commissioner of Internal Revenue and the Defendant, that the statute of limitations (or the statute as extended by prior waivers) had not yet expired.

"(f) The representations described in sub-paragraph (e) were false and misleading since the statute of limitations on assessment and collection of income and profits taxes for Plaintiff's fiscal year ended March 31, 1918 had already expired and the waivers then on file (Exhibits E, H, J and K attached to the petition) were invalid, at the time said representation was made.

[fol. 43] "(g) The misrepresentations described in the preceding sub-paragraphs were made with the intention and purpose of causing Plaintiff to execute the various waivers requested at the time the misrepresentations were made.

"(h) Said mutual mistakes described in paragraphs 36 to 44, inclusive, and in paragraphs 51 and 52 were mistakes of fact, or at least mistakes concerning the parties' own antecedent and existing private legal rights, duties and/or

liabilities, which said antecedent and existing private legal rights, duties and liabilities were to be affected by the execution of said instruments."

4

Paragraph 53 of the original petition is amended so as to read as follows:

"53. Said misrepresentations and mutual mistakes described in paragraphs 36 to 44, inclusive, and in paragraphs 51 and 52 were material, and but for said mutual mistakes and misrepresentations the said J. C. Evins would not have attempted or purported to execute any of the four instruments described in paragraphs 47, 49 and 50 on behalf of the Plaintiff, and Plaintiff would not otherwise have executed or attempted to execute any of said instruments and the purported execution of each of said instruments by the said J. C. Evins resulted solely and approximately from said mutual mistakes and misrepresentations."

5

Paragraph 55 of the original petition is amended so as to read as follows:

"55. Neither Plaintiff nor its officers nor agents discovered the falsity of the representations described in paragraphs 36 to 40, inclusive, and paragraphs 52 above, nor did Plaintiff nor its officers nor agents become aware of the mutual mistake under which the Plaintiff and the Government labored, as described in paragraphs 41 to 44, inclusive, and in paragraphs 41 and 52 above, until after the signing and filing by J. C. Evins, President and Treasurer [fol. 44] of Plaintiff, of the last of the five instruments described in paragraphs 39, 47, 49 and 50 above."

Horace L. Bomar, W. A. Sutherland, Attorneys for Plaintiff.

Order

The foregoing amendment read and considered. Same is allowed subject to demurrer.

This 26 day of October, 1932.

W. H. Watkins, United States Judge.

In United States District Court

Answer

Now comes the defendant through and by Joseph A. Tolbert, United States Attorney for the Western District of South Carolina, and by way of answer to the complaint filed in said cause respectfully shows to this honorable court and alleges:

1

That it is admitted that the petition is filed for the purpose and under the laws as set out and mentioned in paragraph 1 of the petition.

2

That the matters and things set up in the second paragraph of the petition are admitted.

3

That the matters and things set up in the third paragraph are denied.

[fol. 45]

4

That answering the fourth paragraph of the petition the defendant says that said paragraph not being an allegation of fact but a statement of law, it is not called upon either to deny or to affirm the same.

5

That answering the fifth paragraph of the petition, the defendant admits the text of Treasury Decision 2797 as contained in this paragraph to be correct, but defendant avers that it is not called upon to answer to the extent of its application to the claim of the plaintiff.

6

That the allegations of the sixth paragraph of the petition are admitted.

7

That answering the seventh paragraph of the petition it is admitted that the exhibit referred to sets forth the

principal information contained in said return on Form 1031, with the further explanation that the said information is not complete as appears upon said return.

8

That answering the eighth paragraph of the petition it is admitted that Exhibit B, therein referred to, sets forth the principal information which was contained in the excess profits tax return on Form 1103, with the further explanation that the same is incomplete as appears thereon.

9

That the matters and things set forth in the ninth paragraph of the petition are admitted to be true.

10

That the matters and things set forth in the tenth paragraph of the petition are admitted to be true.

[fol. 46] 11

That the matters and things set forth in the eleventh paragraph of the petition are admitted to be true.

12

That answering the matters and things set forth in the twelfth paragraph of the petition it is admitted that the course alleged to have been pursued in reference to the sum of $122.58 would have resulted in the outcome set forth and described in said paragraph.

13

That answering the thirteenth paragraph of the petition it is admitted that the increased rates of the Revenue Act of 1918 would have had the effect on the tax due as set out and alleged in said paragraph, based upon the return made by the plaintiff.

14

That the matters and things set forth in the fourteenth paragraph of the petition are admitted.

15

That the matters and things set forth in the fifteenth paragraph of the petition are admitted.

16

That in answering the matters and things contained in the sixteenth paragraph of the petition it is admitted that if the Commissioner had accepted as correct and accurate the income and excess profits returns filed by the plaintiff, as alleged, the Commissioner could have computed plaintiff's income and excess profits taxes under the Revenue Act of 1918 definitely and exactly, but it is denied that said returns were complete, accurate and correct, and for that reason it was impossible for the Commissioner of Internal Revenue to arrive at the actual amount of taxes due by plaintiff for the taxable period involved.

[fol. 47] 17

That answering the seventeenth paragraph of the petition, the defendant has no information as to the good faith and honest belief in the filing of said returns other than from the circumstances that said returns were inaccurate and incorrect, and not truly reflecting the actual income of the plaintiff for the period involved.

18

That answering the eighteenth paragraph of the petition, the matters and things therein contained are untrue and therefore denied.

19

That the matters and things alleged in the nineteenth paragraph are admitted to be true.

20

That the matters and things alleged in the twentieth paragraph of the petition are admitted to be true.

21

That the matters and things alleged in the twenty-first paragraph of the petition are admitted to be true.

22

That the matters and things alleged in the twenty-second paragraph of the petition are admitted to be true.

23

That the matters and things alleged in the twenty-third paragraph of the petition are admitted to be true.

24

That the matters and things alleged in the twenty-fourth paragraph of the petition are admitted to be true.

[fol. 48] 25

That the matters and things alleged in the twenty-fifth paragraph of the petition are admitted to be true.

26

That the matters and things alleged in the twenty-sixth paragraph of the petition are admitted to be true.

27

That the matters and things alleged in the twenty-seventh paragraph of the petition are admitted to be true.

28

That the matters and things alleged in the twenty-eighth paragraph of the petition are admitted to be true.

29

That answering the allegations of the twenty-ninth paragraph of the petition it is admitted that the said additional assessment referred to in paragraph 22 of the petition was made more than five years after the plaintiff's original income and excess profits tax returns on Forms 1031 and 1103 respectively for the fiscal year ended March 31, 1918 were filed, but as will be more fully explained and set out in the further answer and defense, it is denied that said assessment or the collection of said tax was barred by the statute of limitations applicable thereto.

30

That the allegations contained in the thirtieth paragraph of the petition are untrue and therefore denied.

31

That answering the allegations of the thirty-first paragraph of the petition it is admitted that the computations [fol. 49] therein contained would be correct if based upon proper premises. It is denied that any amount was collected from the plaintiff after the expiration of the period of limitations or that any amount was refundable from the defendant by reason of the allegations contained in the petition.

32

That answering the allegations of the thirty-second paragraph of the petition it is admitted that the plaintiff filed a claim for refund as alleged and that the copy of said claim marked Exhibit C is correct, but it is denied that the same was filed on September 19, 1928, but that it was filed September 20, 1928.

33

That the allegations of the thirty-third paragraph of the petition are admitted to be true.

34 and 35

That answering the allegations of the thirty-fourth and thirty-fifth paragraphs of the petition, which are so correlated as to form one complete allegation, it is admitted that on June 21, 1923, more than five years after the returns described in Paragraph 6 were filed by the plaintiff, the Commissioner of Internal Revenue, through his assistant J. G. Bright, Acting Deputy Commissioner, and through John G. Remey, Chief of Section, addressed and sent a letter to the plaintiff as alleged and that the Exhibit D, referred to, is a correct copy thereof. All other matters and things alleged in said two paragraphs are untrue and therefore denied.

36

That answering the allegations of the thirty-sixth paragraph of the petition it is admitted that the quotation from

the letter therein referred to is correct, but it is denied that there was an obvious or implied representation that the period of limitations applicable to the plaintiff's tax for the fiscal year 1918 had or had not expired, and in further [fol. 50] answer to said allegation the defendant says that plaintiff had filed with the Commissioner of Internal Revenue certain briefs and protests to said tax, and in addition thereto a claim for abatement was pending in reference to a portion of the tax assessed for said period, all of which was well known to the plaintiff, and in addition to that plaintiff had filed other petitions and briefs in reference to taxes for other years, all of which was well known to the plaintiff, its agents and employees.

37

That answering the thirty-seventh paragraph of the petition, reiterating what is said in Paragraph 36 of this answer, the defendant denies that any false representation was made to the plaintiff or any fraud practiced upon it; that the plaintiff had access to counsel learned in the law and had same in its employ; that all of its acts in filing waivers, protests and other papers with the Commissioner of Internal Revenue were done under their professional guidance and advice; and defendant further says that at all times the plaintiff was well informed of its rights and of the legal effect of its conduct, and that in no way was it mislead or deceived by any act or conduct on the part of the Commissioner of Internal Revenue or of his agents and employees.

38

That answering the allegations of the thirty-eighth paragraph of the petition the same are untrue and therefore denied.

39

That answering the thirty-ninth paragraph of the petition it is admitted by the defendant that the waiver was enclosed with a letter sent to the plaintiff, but it is denied that any false or misleading representations were contained in said letter or that the plaintiff acted thereon because of any lack of understanding or knowledge of the full purport

of its act and conduct; that the said J. C. Evins, President and Treasurer of the plaintiff, formally executed the said [fol. 51] waiver and signed the same in the course of his efforts to obtain a reduction in said taxes; that the said J. C. Evins is a business man of ability and fully capable of transacting the business in hand, and it is alleged that he had at his service attorneys and counselors learned in the law and that he acted upon their direction and advice, and was fully informed concerning the nature of the transaction in which he was engaged. It is admitted that Exhibit E is a correct copy of the waiver referred to. All other matters and things contained in said paragraph are untrue and therefore denied.

40

That answering the allegations of the fortieth paragraph of the petition the defendant again denies that any false or fraudulent representations were made to the plaintiff or to its president, J. C. Evins; that said J. C. Evins and other employees of the plaintiff corporation were well informed of the rights of the corporation and had access to the revenue laws and the advice and counsel of attorneys learned in the law; and while they had a right to rely upon the representations of the Commissioner of Internal Revenue and his assistants, it is denied that they can now be heard to say that a solemn act performed in an effort to get a reduction in its taxes not only for the period involved in suit but for other taxable periods was done under a misapprehension of their rights caused by deceit and fraud on the part of the Commissioner of Internal Revenue and his assistants. And in further answer to said paragraph the defendant alleges that on account of the tremendous volume of business and activity involved in the assessment and collection of internal revenues for the Treasury of the United States, there are numerous departments of the Bureau of Internal Revenue and thousands of employees whose services are necessary for the handling of the volume of correspondence and business in connection therewith; that by reason thereof oftentimes letters and correspondence in reference to the tax accounts of a single taxpayer are divided and handled by two or more departments and by dozens of individuals in the Bureau; that oftentimes one phase of the taxpayer's protest or letters

and corespondence in reference thereto are handled by separate divisions or departments, so that at times an act [fol. 52] is done or statement is made not actually known or directed by another department, and in very rare instances do the particular matters in hand reach the personal attention and direction of the Commissioner of Internal Revenue. For these reasons and on account of these conditions the defendant avers and alleges that it was impossible and improbable that a fraud or deceit should have emanated in the mind of any one person or in the minds of any one or two persons connected with the handling of the correspondence in reference to the petitions and briefs of the plaintiff filed in reference to the period 1918; with intent to deceive and mislead the plaintiff or any other person; that these facts are generally known to taxpayers and attorneys who practice before the Department and who handle income tax matters; and for that reason the defendant avers that it is incumbent upon the taxpayer, and was incumbent upon the plaintiff in this case, to have used his own judgment and relied upon the advice and counsel which was given to him by attorneys and auditors in his employ and at his command; and that the effort now to charge deceit and fraud against the Commissioner of Internal Revenue and his assistants is but an effort to escape negligence or carelessness on the part of the plaintiff in the handling of its affairs in connection with the Bureau of Internal Revenue.

41

That answering the allegations of the forty-first paragraph of the petition the defendant again denies any false representations or fraud on the part of the Commissioner of Internal Revenue or his assistants, and in further answer reiterates what has heretofore been said in the fortieth paragraph of this answer.

42

That answering the forty-second paragraph of the petition it is denied that there was any false representation or deceit practiced by the Commissioner of Internal Revenue or his assistants inducing the plaintiff to execute and file the waiver referred to, and it is denied that the same was [fol. 53] induced by a mutual mistake between the parties or on the part of either of the same.

43

That answering the forty-third paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

44

That answering the forty-fourth paragraph of the petition it is denied that the plaintiff received no benefits or advantages in the filing of said waiver as will be more fully set forth and explained in the further answer to the petition.

45

That answering the forty-fifth paragraph of the petition the same is admitted to be true.

46

That answering the forty-sixth paragraph of the petition the same is admitted to be true.

47

That answering the forty-seventh paragraph of the petition it is admitted that the waiver marked Exhibit H was filed with the Commissioner January 19, 1924 and that the copy attached is a true copy thereof. All other matters and things in said paragraph are denied.

48

That answering the forty-eighth paragraph of the petition it is admitted that on December 3, 1924 the Commissioner of Internal Revenue sent with a letter to the plaintiff as alleged a waiver for execution and filing by the plaintiff. It is further admitted that the copy of said letter marked Exhibit I is a correct copy thereof.

[fol. 54] 49

That answering the forty-ninth paragraph of the petition it is admitted that the two waivers described in said paragraph were filed with the Commissioner of Internal Revenue by the plaintiff, and that the exhibits marked Exhibit J and Exhibit K are correct copies thereof.

50

That answering the fiftieth paragraph of the petition it is admitted that the Commissioner of Internal Revenue requested the plaintiff to execute a waiver as set forth in said allegation and that plaintiff signed and filed the same November 18, 1925, and that the exhibit marked Exhibit L referred to is a correct copy thereof.

51

That answering the fifty-first paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

52

That answering the fifty-second paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

53

That answering the fifty-third paragraph of the petition it is denied by the defendant that there was any misrepresentation or mutual mistake in the execution and signing of said waivers, and the defendant alleges that the said J. C. Evins, president of said corporation, signed the same freely and voluntarily without influence of deceit or misstatement, and defendant avers that same are valid and subsisting instruments for the purposes therein expressed.

[fol. 55] 54

That answering the fifty-fourth paragraph of the petition, same is untrue and therefore denied.

55

That answering the fifty-fifth paragraph of the petition, for the reasons hereinbefore set out in previous paragraphs of this answer, the allegations of said Paragraph 55 are denied.

56

That answering the fifty-sixth paragraph of the petition it is admitted that at the time J. C. Evins, President and Treasurer of the plaintiff corporation, signed said waivers

referred to, the same did not contain the signature by or on behalf of the Commissioner of Internal Revenue, but the defendant avers that after the same were forwarded to the Commissioner the same were formally and duly executed by and on behalf of the Commissioner of Internal Revenue and became valid and subsisting instruments for the purposes therein expressed.

57

That answering the fifty-seventh paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

58

That answering the fifty-eighth paragraph of the petition, the same is admitted to be true.

59

That answering the fifty-ninth paragraph of the petition, the matters and things therein alleged are admitted to be true excepting any liability alleged against the defendant.

[fol. 56] 60

That answering the sixtieth paragraph of the petition it is admitted that John F. Jones was not at the time of the bringing of this action and is not now the Collector of Internal Revenue for the District of South Carolina.

By way of further answer and defense the defendant says:

1

That with reference to a large portion of the tax herein set forth, to wit, $102,420.96, which was assessed for the fiscal year ended March 31, 1918 by the Commissioner of Internal Revenue on the May 1921 list, against the plaintiff above named, the plaintiff on July 7, 1921 filed with the Commissioner of Internal Revenue a claim for abatement in language and form as follows:

Claim for Abatement

Taxes Erroneously or Illegally Assessed

STATE OF SOUTH CAROLIA,
County of Spartanburg, ss:

(Important: This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.)

(Name of Claimant:) Clifton Manufacturing Company.

(Address of claimant; give street and number as well as city or town, and state:) Clifton, S. C.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

[fol. 57] 1. Business engaged in by claimant: Manufacture of cotton goods.

2. Character of assessment or tax: Income and Excess Profits Tax for fiscal year 1918.

3. Amount of assessment: $102,420.26.

4. Amount now asked to be abated: $80,800.12.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

The Agent was in error in his adjustment of depreciation taken for the period from 1904 to 1916, inclusive. In Memorandum 106, issued by the Commissioner of Internal Revenue since the Revenue Agent made his examination—which memorandum was for the guidance of the Income Tax Unit in the adjustment of depreciation for prior years—it is provided that where the assets were reasonably worth at the beginning of the taxable year the amount at which they were carried on the books of the corporation, no further adjustment would be required.

It appears that the Agent was in error in his adjustment of stock in process in taking same on the basis of the cost of cotton plus 80% of the cost of finished goods—the correct basis being the cost of cotton plus 50% of the cost of finished goods, this basis, we understand, having been accepted by the Department as reasonable and fair.

The original returns show stock in process taken at an arbitrary figure. The proper adjustments have been made in the amended returns in the inventory of stock in process, same being taken in accordance with Departmental regulations, at "cost" or "cost or market, whichever is lower."

We respectfully request the abatement of the above assessment, based upon the amended returns hereto attached, and if our Claim for Abatement is not approved, we hereby [fol. 58] request that we be granted a hearing, at which time we may be heard in support of same.

(S.) J. C. Evins.

Sworn to and subscribed before me this 6th day of July 1921. H. K. Osborne, N. P. S. C.

2

That having filed said claim for abatement in reference to said tax and thereby obtained a stay and a delay in the collection of the same, under the provisions of Section 611 of the Revenue Act of 1928, a payment of the same after the expiration of the period of limitations properly applicable thereto is not an overpayment of tax under the provisions of Section 607 of said Act, and defendant avers with reference to said tax the plaintiff cannot maintain this suit for recovery thereof and the same is hereby pleaded in bar.

3

That having executed and filed the several waivers set out and described in the bill of complaint and admitted in the answer referring thereto, the assessment and collection of the entire amount of tax involved in suit was made within the period of limitations properly applicable thereto as extended by said waivers, and the same is hereby pleaded in defense and bar of recovery by this action.

Wherefore the defendant prays judgment that the action be dismissed; that judgment be rendered in favor of the defendant; that the plaintiff recover nothing by this action; that judgment be rendered in favor of the defendant for the recovery of its costs; and for such other and further relief as the defendant may be entitled.

(Sgd.) Joseph A. Tolbert, United States Attorney.

[fol. 59] *Duly sworn to by Joseph A. Tolbert. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA

L-1498

CLIFTON MANUFACTURING COMPANY, a Corporation,
Plaintiff,

vs.

THE UNITED STATES, Defendant

Opinion

Statement of Issues

While the pleadings in this case are voluminous, the real issues may be stated more briefly. The statement of facts hereinafter set out will serve to present the issues in such further detail as may be necessary to their complete understanding.

The complaint was filed on October 13, 1931. It demands judgment against the defendant for the sum of $162,805.61 and interest, as a refund of taxes claimed to have been illegally assessed and collected after such assessment and [fol. 60] collection had been barred by the Statute of Limitations. As to the amount, plaintiff now claims only the sum of $57,265.76, with interest from October 15, 1926, at the legal rate, and there seems to be no dispute that if entitled to recover at all, this is the correct amount. The collection in question involved assessments imposed upon plaintiff for the fiscal year ending March 31, 1918. The first returns were filed on May 28, 1918, and the second return was filed on April 29, 1919, after the passage of the Revenue Act of 1918. Anticipating a defense founded thereon, plaintiff set out in its complaint the filing of certain waivers with the Commissioner of Internal Revenue, the first being under date of June 25, 1923, a number of others being filed from time to time up to and including the date of November 18, 1925. An inspection of these dates shows that the first waiver was signed more than five years after the filing of the original returns, but within less than five years after the filing of the second return. It is the contention of plaintiff that the filing of the first returns began the tolling of the Statute of Limitations, and that the right

of assessment and collection had become barred before the filing of the first waiver. It is further contended that these waivers were obtained from the plaintiff through fraud and misrepresentation upon the part of the Government's agents; that they were obtained and signed under mutual mistake; that the officer of the corporation, who signed as treasurer or as president and treasurer, had no authority in law to execute such waivers; and the Court is asked in its equitable jurisdiction to declare said waivers void and ineffective. It will be observed that plaintiff raises no question as to the correctness of the amount assessed and collected, but only as to the right of the Government, at the time it was done, to assess and collect, the sole issue being (if the waivers were invalid) whether defendant's right to assess and collect had been barred by the Statute of Limitations. Defendant interposes a general denial of liability, and sets up as a bar to recovery the fact that a claim for abatement had been filed with the Commissioner of Internal Revenue by the plaintiff on July 7, 1921, and also alleges validity of the several waivers described in the bill of [fol. 61] complaint, and their sufficiency to avoid the Statute of Limitations. Defendant also maintains that the tolling of the Statute of Limitations did not begin until after the filing of the second return on April 29, 1919. At the hearing, defendant interposed a motion to dismiss, substantially upon the ground that the plaintiff had itself alleged the execution of the waivers above referred to, which, if valid, barred the right of recovery; and that the Court is without jurisdiction in this action to grant the equitable relief requested. The motion was also grounded upon the contention that plaintiff is seeking, through the means of equitable relief, to cancel a written instrument in order to obtain the benefit of the Statute of Limitations, which would be in violation of the maxim that "he who seeks equity must do equity". From the foregoing, it will be seen that the issues thus presented to the Court are, as follows:

I. Upon the motion to dismiss: Does the Court have jurisdiction to determine the validity or cancellation of the waivers?

II. Upon the merits:

(a) Does the Statute of Limitations begin to run from the filing of the first returns on May 28, 1918, or from the filing of the second return on April 29, 1919?

(b) The validity and effect of the waivers.

The action is brought under Section 24(20) of the Judicial Code (28 U. S. C. A. 41(20)), the amount claimed being in excess of Ten Thousand Dollars; and since it is admitted that the Collector of Internal Revenue, who made the collection, is now out of office, there is no question of the Court's jurisdiction under the provisions of the Tucker Act.

Statement of Facts

So far as the testimony goes, there is no substantial, if indeed any, conflict. Both sides have filed requests for findings of fact and of law, but the difference in the requests as to facts relates not so much to a difference of [fol. 62] opinion of what took place, as to the effect of what was done. From the testimony and certain stipulations filed by counsel, I find the facts to be, as follows:

The plaintiff is now and was, at all times hereinafter referred to, a corporation chartered under the laws of the State of South Carolina, with its principal place of business in the Western District of said State, and during all such times J. C. Evins was and is President and Treasurer thereof. As such executive officer, he filed the various returns and waivers herein mentioned, conducted the negotiations and correspondence with the Government, made payments of taxes from time to time, and filed the claims for abatement and refund herein referred to. Plaintiff filed its original returns under the Revenue Act of 1917, for the fiscal period of April 1, 1917 to March 31, 1918, on May 28, 1918, showing a tax due of $171,002.96. This tax was paid on September 11, 1918. After the passage of the Revenue Act of 1918, said corporation filed, on April 29, 1919, an additional return, covering the period ending March 31, 1918, showing an additional tax due of $50,638.75, which was paid $13,690.65 on March 21, 1919, and $36,948.10 on September 15, 1919. In June, 1919, an additional assessment of tax was made for said fiscal period and paid by the corporation on June 16, 1919. An additional deficiency assessment of tax for said fiscal period was made against the corporation in May, 1921, and paid, as follows: $1,124.35, March 15, 1923; $1,665.96, September, 1926; $99,629.95, October 15, 1926, and an interest

charge of $31,147.32. On September 4, 1926, an additional deficiency assessment was made against the corporation in the sum of $37,313.46, and interest to the amount of $1,174.61. In reference to this assessment, a deficiency letter was mailed to taxpayer on May 26, 1926, and no appeal was taken to the Board of Tax Appeals. The tax was paid on October 15, 1926. On July 7, 1921, the corporation filed a claim for abatement for $80,800.12 of the amount of $102,420.26, which was assessed in May, 1921. This claim was not allowed, but the date of disallowance is not disclosed by the evidence. This however, appears to be immaterial, since both sides concede that the portion of the tax covered by the claim for abatement cannot, in [fol. 63] any event, be recovered by plaintiff, because of the provisions of Section 611 of the Revenue Act of 1928, as construed in Graham & Foster v. Goodcell, 282 U. S. 409, and there is, therefore, no dispute as to the amount which plaintiff is entitled to recover, in the event that its claim is allowed by the Court. Claim for refund to the amount of $175,000.00, for the period ended March 31, 1918, was filed by the corporation on September 20, 1928, assigning among other reasons for basis of the claim that the amounts collected in October, 1926, were barred by the Statute of Limitations applicable thereto. The claim was rejected on October 24, 1929. On June 21, 1923, the Acting Deputy Commissioner of Internal Revenue wrote to the plaintiff a letter, of which the following is a copy:

(Letterhead, Treasury Department)

June 21, 1923.

Clifton Manufacturing Company, Clifton, South Carolina.

Sirs: Reference is made to the proposed additional assessment in the amount of $74,876.74, for the year 1918, as outlined in office letter dated March 5, 1923.

You are advised that in order that the interests of the Government may not be jeopardized, pending consideration of your brief dated March 16, 1923, you are hereby requested to fill out and properly execute the enclosed form of waiver and return the same to this office within thirty days from the date of this letter.

In your letter of transmittal, reference should be made to IT:CA:M-2-RJR-2112-11.

Respectfully, J. G. Bright, Acting Deputy Commissioner, by (Sgd.) John G. Remey, Chief of Section.

Enclosure: Form of Waiver.

[fol. 64] In reply thereto, the following letter was sent the Commissioner of Internal Revenue:

(Letterhead, Clifton Manufacturing Company)

June 25, 1923.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: Replying to yours of the 21st inst. IT:CA:M-2-RJR-2112-11, as requested we have signed and herewith return waiver covering the adjustment of additional taxes assessed against Clifton Mfg. Co. for the year 1918.

Very truly yours, (Sgd.) J. C. Evins, Pres.

This letter enclosed waiver, of which the following is a copy:

Income and Profits Tax Waiver

(872M.)
IT:CA:M-2.
2112; RHR 11.

Clifton, S. C.,
June 25, 1923.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Clifton Mfg. Co., of Clifton, S. C., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Clifton Mfg. Co. for the years 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other pur-
[fol. 65] poses", approved August 5, 1909. This waiver is

in effect for one year from the date it is signed by the taxpayer.

Clifton Mfg. Co., Taxpayer (Seal), by (Sgd.) J. C. Evins, Pres. & Treas. (Sgd.) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Subsequent correspondence followed and other waivers were executed by the plaintiff under dates of January 19, 1924, December 4, 1924, and November 18, 1925. On each of these waivers appeared, underneath the signatures of the parties, as in the one hereinabove set out, the following: "If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed". It will be observed that the waivers were signed in each instance in the name of the corporation, by J. C. Evins, as Treasurer or as President and Treasurer, and the seal of the corporation was in each instance affixed.

The Court finds that the Act of 1918 and the departmental regulations required the filing of a new and independent return in the instant case; that material changes in the law were effected by said act, and additional information was required to be furnished, and that the corporation was required by said act to pay additional taxes. We also find that the tolling of the Statute began with the filing of the second return on April 29, 1919, and not [fol. 66] on May 28, 1918, upon the filing of the first returns, as claimed by plaintiff. While this disposes of the ground upon which plaintiff bases its claim of misrepresentation and mutual mistake, and in effect also its claim of lack of authority of its president and treasurer to sign the waivers, the Court finds as a fact that there was no such misrepresentation, mutual mistake or lack of authority as to invalidate the waivers, even if signed after the

expiration of the statutory period. Whether the statutory period had or had not expired when the first waiver was signed was sufficiently uncertain to create a divergence of views. One of the main issues in the instant case is whether, under the law, the Statute began to run from the date of filing of the first returns or from the date of filing of the second return. The issues have been much clarified by later decisions of the Supreme Court, particularly Bowers v. New York & Albany Lighterage Co., 273 U. S. 346; Florsheim Bros. Dry Goods Co. v. United States, 280 U. S. 453; and Stange v. United States, 282 U. S. 270. If a mistake existed, it was a mistake principally as to a question of law, of which both sides are presumed to have had knowledge, and one side was as familiar with the facts as the other. It is evident that both the representatives of the Treasury Department and of the plaintiff corporation affixed their signatures to the waivers under the impression that the statutory period of limitation had not expired. Certain of those representing the Commissioner of Internal Revenue testify that, under the policy of the Government, a waiver would not have been requested if it had been understood that the statutory period of limitation had expired; and Mr. Evins, President and Treasurer of the plaintiff corporation testified that he had no authority to sign and would not have signed if he had understood such fact to exist. Certainly there was no positive misrepresentation of fact on the part of the Government's representatives and it is evident to my mind that, entertaining the view that he did, the Deputy Commissioner would have proceeded immediately with an effort to levy and collect such taxes as his investigation indicated were due, in order to protect the Government's interests, unless the waivers had been filed. The claim for abatement had been filed on July 7, 1921, and whether the claim had then been disallowed or not, [fol. 67] plaintiff evidently regarded it as meritorious and equally, with the Deputy Commissioner, desired the benefit of complete and proper investigation of records, in order to arrive at the amount justly due.

I further find that the waivers signed by its president and treasurer were valid and binding upon the corporation. Such further discussion of the facts and findings thereon, as may be necessary to this opinion, will appear

subsequently herein, in connection with my conclusions upon the law of the case.

Conclusions of Law

1. Motion to Dismiss

As stated above, this action is brought under Section 24(20) of the Judicial Code, (28 U. S. C. A. 41 (20)), which grants jurisdiction to the Courts in the following language:

"Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, [fol. 68] if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."

Particular attention is directed to the expression, "would be entitled to redress against the United States, either in a court of law, equity, or admiralty", and, "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of

any penalty claimed to have been collected without authority or any sum alleged to have been excessive *or in any manner wrongfully collected*". (Italics ours.)

The defendant earnestly stresses the contention that the issues of fraudulent misrepresentation and mutual mistake are equitable in their nature, and only cognizable by a court of equity, and that the Court is, therefore, without jurisdiction to consider these issues in the instant action; and that since the waivers, which are those sought to be avoided and cancelled, are set up in the complaint, the action must be dismissed, it being undisputed that the waivers, if valid, would preclude plaintiff's recovery. We think that the language of the statute so plainly confers upon the courts the requisite jurisdiction to determine equitable issues as to leave no room for argument upon that particular point. This, however, does not of itself dispose of the question of the right of the Court in the instant case to determine these equitable issues. Federal courts have, from the beginning of our jurisprudence, been careful to preserve the distinction between actions at law and suits in equity. Formerly, it was an unbending rule in these courts that legal and equitable issues must be tried in separate suits or actions. In South Carolina the rule was early adopted that when, in the course of a proceeding at law, an equitable issue arose necessary to the pre-determination of a legal issue, the action at law would be stopped and a separate issue made up in equity and first tried. Conversely, where, in a suit in equity, a legal right came into controversy, triable as of right by a jury, the suit in equity was suspended and an issue at law made up [fol. 69] for trial by a jury. In each case, upon the determination of the special issue, the case was restored to the proper docket and proceeded to final judgment. The order in which these issues should be tried is to be determined by the judge as a matter of discretion. W. B. Boyle Co. v. Automobile Ins. Co. of Hartford, Conn., (S. C.) 166 S. E. 886. The rule in the United States courts required, in cases where it developed in the course of the proceeding that the case was improperly brought, either at law or in equity, that the whole proceeding be dismissed and a new suit or action filed. In recent years, while still jealously maintaining the distinction between suits in

equity and actions at law, the practice has been much liberalized, particularly under the new rules in equity, promulgated in 1913, Rules 22 and 23 being applicable to the case at bar. The practice has been further liberalized under the Act of March 3, 1915, 38 Stat. 956, Judicial Code Section 274-a. In the case of Twist v. Prairie Oil Co., 274 U. S. 684, the Court discusses the distinction that must be maintained between suits in equity and actions at law. In that case it was held that waiver is permissible because the objection to equity jurisdiction does not go to the power of the federal court but to the merits. Rule 22 makes it plain that it was the purpose of the Supreme Court so to liberalize the practice as to avoid the former drastic rule, which required the dismissal of a cause mistakenly brought in the wrong jurisdiction. When taken in connection with the section of the Judicial Code above referred to, it is evident that it is not now intended to limit transfers under this rule to cases in which the bill itself might fail to contain sufficient allegations to present a case for equitable relief, but also to enable this to be done where issues subsequently raised by the pleadings, or where the admitted or established facts of the case as they might be presented in the case, show the real nature of the case to be one at law. It must be remembered that the remedial provisions of the statute should be liberally construed, both to prevent the unnecessary prolonging of litigation and to prevent the dismissal of causes upon too technical grounds. In the case of Colleton Mercantile & Mfg. Co. v. Savannah River Lumber Co., 280 Fed. 358, (C. C. A.-4), the late Judge Charles A. Woods stated the rule with unusual clearness. That was [fol. 70] a suit in equity to enforce specific performance of a contract. A claim of title to the land had been interposed by one W. B. Cruber, and he was joined as a defendant, in order to remove from the title the cloud cast upon it by his claim. In discussing Equity Rule 23, the Court said that "this rule means that, where in an equity case a matter triable by jury arises, the court shall not refuse to try it, and shall not go through the form of sending it to the law side of the court, but shall determine it according to all the principles applicable—one of which is the right of trial by jury. Under rule 22, if the case is essentially a law case improperly brought in equity, it must be transferred to the law side. Under rule 23, if the case, looked at as a whole, is

an equity case, but a question arises in it triable by jury, a jury trial is held to settle the legal issue without transfer. When the legal issue has been settled by the verdict of the jury, the court adjudicates the equitable issues in the light of the verdict". The foregoing case was quoted with approval in the case of Van Wagenan v. A. L. Reed Co., et al., 287 Fed. 145, at Page 147. In the case of Southern Ry. Co. v. City of Greenwood, et al., 40 F. (2d) 679, this Court had occasion to make an elaborate investigation of the authorities, and the foregoing questions were fully discussed in the opinion. There an action in equity was brought to enjoin trespass upon lands or rights-of-way claimed by the railroad company. The defense raised the question of paramount title and claimed the right of trial of that issue by jury. This right is guaranteed both by the Constitution and statute laws of South Carolina. Since the issue of paramount title was determinative of the right of complainant to recover, we held that the plaintiff's request for a jury trial must be granted, and the case was subsequently determined by a verdict of a jury. A case more nearly similar in its general aspect to the one at bar, is the case of Greenwood Market v. Insurance Co. of North America, 34 F. (2d) 53. In that case suit was brought upon an insurance policy and the defense interposed certain provisions of the policy which were prima facie sufficient to avoid the claim. Plaintiff filed a reply, asking for a reformation of the policy by the attachment of a certain rider showing defendant's consent to the execution of a chattel mortgage by the plaintiff, without which [fol. 71] consent plaintiff could not recover. After the filing of this pleading, plaintiff filed with the Court a motion to have made up an equitable issue, and to have the policy reformed, and asked that the cause be transferred to the equity side of the docket for the hearing of this issue. No amendment of the pleadings was necessary for that purpose, and, after careful consideration, the motion was granted. By consent of counsel, the testimony was taken upon the whole case. The Court decided the equitable issue in favor of plaintiff, and, thereupon, submitted the law issues to the jury. The old practice of having separate judges for the courts of law and chancellors presiding over courts of equity has long since been abandoned in most jurisdictions, and now, particularly in the

district courts, the same judge acts in both capacities. In the instant case, the plaintiff anticipated the defense of and set out the waivers and challenged their validity upon the grounds mentioned. The answer also set up the waivers and relief upon them as barring the right of recovery. Under the statute conferring jurisdiction in such cases as the one at bar, the court has jurisdiction both at law and in equity. The issue presented is one properly cognizable by the court, and we think it is within the power of the court, as also its duty, to determine the issue in the instant case. It might of its own motion, if such course were necessary, transfer the cause to the equity side of the court for the determination of that issue, and since it is a prerequisite to determination of the other issues, we do thus take equitable cognizance and the issues thus raised will be decided upon their merits. While there is some confusion and apparent conflict in the decisions, the weight of authorities is in accord with what we have heretofore said, and particularly as related to the statute under which this action is brought. United States v. Milliken Imprinting Co., 202 U. S. 168; William Cramp, etc. Co. v. United States, 239 U. S. 221; United States Cartridge Co. v. United States, 62 Ct. Cl. 214.

The motion to dismiss is, therefore, overruled.

II. Upon the Merits

(a) Does the Statute of Limitations begin to run from [fol. 72] the filing of the first returns on May 28, 1918, or from the filing of the second return on May 29, 1919?

In the determination of this question, it is necessary to understand the provisions and requirements of the Act of 1918, and, by comparison, to arrive at a proper understanding of the changes and amendments thereby effected in and over former revenue laws. The first returns had reference only to the provisions of the Act of 1917, and were in compliance therewith. The act of 1918 was retroactive in its provisions, and for that reason the return filed in pursuance of that act overlapped a portion of the period covered by the former returns. In view of the language of certain of the decisions cited by plaintiff's counsel, it is important to consider not only what the law required, but what was actually done in compliance therewith. Without attempting to recapitulate in exact words the changes

effected by the latter act, a review of the act will show the following (we quote substantially from defendant's brief): In the Act of 1918, personal service corporations were placed in the same category with partnerships; new excess profits taxes were provided for; a differentiation was made between invested capital and income; a provision was made for taxation of appreciation in property values; in the administration of trusts and estates, distinction was made between income and capital gains; a differentiation was made between earned and unearned income; a change was made in reference to returns and taxes paid based on a fiscal year; consolidated returns were provided for; returns were changed in reference to United States bond and tax-exempt securities required to be listed; a reasonable allowance was made for obsolescence; amortization is provided for; contributions to a special fund for vocational rehabilitation is provided under credits allowed; exemptions in reference to married persons and for dependents are allowed for the first time; and a complete restatement of the terms relating to invested capital is made.

With these changes in view, Section 336 of the Act of 1918, provides, inter alia, as follows: "That every corporation, not exempt under Section 304, shall make a return for the *purposes of this title.*" (Italics ours.) It is true that [fol. 73] Section 205 (a) of the Act makes reference to returns for the fiscal year beginning in 1917 and ending in 1918, and provides for the crediting or refunding of taxes paid thereunder in accordance with another section of the statute. We are of opinion, however, that the purpose of this section was to define rights of the taxpayer and the method of computing the tax, and not intended in any way to abrogate the necessity of making the returns which the act required. The later return filed under the Act of 1918 was required under the law, not only for the purpose of disclosing certain additional information material to the assessment of taxes in accordance with provisions of the act, which involved substantial changes in the law, but also to show, in the event that all requisite information was disclosed under the first returns, that such was a fact. Without such showing, both positive and negative, the Commissioner would not have been in position to make the levy, and it was in compliance with the foregoing requirements that the later return was tendered by the taxpayer and ac-

cepted by the Government. It may be assumed for the purposes of this opinion that the Commissioner was vested with the privilege in certain cases, after an inspection of overlapping returns filed under the Act of 1917, to determine that additional returns were not necessary and to waive the requirement that they should be filed. Evidently such a view was largely determinative of the decisions of the courts, particularly in construing returns filed in pursuance of the Act of 1918, but covering a period retroactively affected by the Act of 1921. In those cases, although filed prior to the passage of the latter act, the Commissioner accepted the returns as sufficient, and made assessments and collected taxes thereon. In the instant case, we think that the facts are sufficient to show that the first returns contained insufficient information for the proper determination of the amounts to be assessed. Certain it is that the new return was required and furnished and formed the basis of the taxes subsequently levied and collected. In this connection, it should be observed that whatever additional taxes were provided by the Act of 1918 for the period beginning January 1 and ending March 31, of that year, were assessed under that act and were not and could not have been assessed or collected until the [fol. 74] passage of the Act in February, 1919. To hold, therefore, that the statute began to run upon the filing of the first returns would result in reducing the period of limitation to considerably less than the five years expressly provided by the statute. We must assume that Congress did not and could not have contemplated or intended such result. While it is true that the returns filed in 1918 were, when filed, complete returns and sufficient in law to fix the period from which the limitation should run, this related of necessity only to such taxes as could be assessed or collected under the Act of 1917. It was not and could not have been contemplated that future retroactive taxes would be levied for the period mentioned, and that a provision of limitation should preclude their collection. The absurdity of such presumption becomes manifest in view of the right of Congress to fix the limitation for any period—four years, one year, or even six months. In such case the assessment and collection might have been barred when the statute was enacted. We cannot conceive such intention on the part of Congress. It is assumed that an

intention of that body to curtail the limitation as affecting a particular case would be expressed in plain and unmistakable language.

Among the cases cited in plaintiff's brief are the following: Myles Salt Co. v. Commissioner, 49 F. (2d) 232, (CCA-5); Isaac Goldman Co. v. Burnet, 51 F. (2d) 427, (D. C. App.); Valentine-Clark Co. v. Commissioner, 52 F. (2d) 346, (CCA-8); Adams, Cushing & Foster, Inc., 19 B. T. A. 89 (dismissed by C. C. A., first Circuit, upon confession of error).

In the first case mentioned, a tax return was filed for the fiscal year ending in 1921, before the enactment of the 1921 Revenue Act. After the passage of the act, no new or amended return was filed or requested. No change was effected by the new act pertaining to the taxpayer's liability, except that by the new act it was deprived of a credit of some two thousand dollars on its net income, thus increasing its tax about $35.00. It was held that the return which would date the beginning of the limitation period and lack of which would prevent limitation, is one made in substantial conformity to the law which required it. The Court held that a return which starts the running of the [fol. 75] statute "must purport to cover the entire period involved, and must show the items of gross income, deductions, and credits of the taxpayer with such definiteness as to permit an assessment of the tax, if accepted as correct". In that case the return was retained by the Commissioner, together with the money paid on it, and later on an audit of it was had, in 1923, without request for any amendment of it. Under the circumstances shown, we have no reason to question the correctness of the Court's decision as limited to the exact point in issue.

Likewise, in the case of Isaac Goldman & Co. v. Burnet, supra, the issues involved an overlapping return for the twelve months' period ending April 30, 1921. In that case the Court held: "We can find no provision in the Revenue Act of 1921 which requires the filing of a new return from taxpayers using the fiscal year basis, in cases where a return had been duly filed under existing law, except, perhaps, *in those cases in which, under the* 1921 *act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved.* (Italics ours). The Court held further: "In this

instance, the taxpayer had filed the return it was required to file under the then prevailing law, and paid the tax. The new law was in all respects the same as the old so far as its tax liability was concerned. The repetition of the figures already filed would have been a wholly vain and useless proceeding''. This case followed the ruling laid down in the case of Myles Salt Co. v. Commissioner, supra. It is evident from the opinion that only one return was filed, and such expressions in the opinion as relate to the running of the statute from the date of the first return, if a second return had been filed, is mere obiter.

The case of Valentine-Clark Co. v. Commissioner, supra, also arose under the provisions of the Act of 1921, and related to an overlapping return for the fiscal year ending January 31, 1921. This case cites as authorities and follows the two cases above discussed. As in the other cases, it is necessary to consider the exact facts surrounding the case, in order to appreciate the distinction between it and the case at bar; and the final decision arrived at, in order [fol. 76] to be properly appreciated, must be considered in connection with the reservations set out in the opinion.

While it is true that the returns filed in 1918 were entitled to be and were accepted as complete returns under the provisions of the law then existing, they did not and could not contemplate subsequent enactments involving all or any portion of the period covered. Upon the passage of the Act of 1918, requiring returns for the purposes of the act, a new situation was created and the returns, so far as that act was concerned, became merely tentative. We think the principles laid down in the case of Florsheim Bros. Dry Goods Co. v. United States, 280 U. S. 453, are applicable here. The Act of 1918 did make certain provisions relating to overlapping returns. It did not declare that such returns should be considered as complete returns for the period embraced in the year 1918 for the purposes of the act, but still required such additional returns for the purposes of the act as might show all requisite information; and it did not provide merely that additional information should be furnished, but required in express language a return for the purposes of the act. Therefore, in whatever sense the returns of 1918 were to be considered in assessing subsequent tax, they must be

regarded as only tentative returns. We deem it unnecessary to review and analyze the cases cited in defendant's brief. The case of United States v. Updike, 32 F. (2d) 1, affirmed 281 U. S. 489, contains certain analogies to the case at bar, and the reasoning supports the views hereinbefore expressed. The case of Davis Feed Co. v. Commissioner, 2 B. T. A. 616, is directly in point, and likewise accords with these views. See also Whitney Bodden Shipping Co. v. United States, 52 F. (2d) 1003; Ralston Purina Co. v. United States, 58 F. (2d) 1065. In the last mentioned case the return was made on November 30, 1918, and after the passage of the Act of 1918, a final return was made on June 16, 1919, and it was held by the Court that the period of limitation began to run upon the filing of the last return. The opinion, however, was devoted mostly to other questions than the one at issue. See also Holmes Federal Taxes, 1922 Ed., p. 829; Prentice Hall Tax Service, Vol. 3, 1932, Par. 19370, subd. (1).

[fol. 77] (b) Validity and effect of the waivers.

Assuming that we are correct in holding that the period of limitation began to run from the date of filing the second return, and that the waivers were, therefore, timely, the questions of fraudulent misrepresentations, mutual mistake and lack of authority of plaintiff's president and treasurer to sign, become entirely moot. The only grounds upon which the validity of the waivers are challenged are based upon the assumption that the limitation provided by statute had expired. The charges of fraudulent misrepresentation, of mutual mistake in executing the waivers, and lack of authority of plaintiff's president and treasurer to execute them, are all predicated upon the claim that the statutory period of limitation had expired. No. claim is, and we assume that none can be seriously, made that the president and treasurer who signed the returns, the claims for abatement and refund, and who made all payments and conducted all correspondence and negotiations with the Government, was without authority in these respects. During all the years since the first returns were filed, he has been in effect the alter ego of his corporation, which has received and accepted the benefit of whatever he did, and which was in position to know, and we must assume did know, acquiesce in and ratify his acts. He was the chief executive officer of the corporation, under whose seal, in

each instance, the waivers were executed, and it was not until in 1928, when the claim for refund was filed, that any question of his authority to sign the waivers was presented to the Government; and even when this was done, it was done by this same officer in the name of the corporation and under its official seal. There is no indication in the evidence that any action by the directors of the corporation authorized the filing of the claim for refund, or any disclaimer by them of the authority of the president and treasurer in signing the waivers. It is evident from the testimony that the whole initiative in this respect was taken by the president and treasurer in the name of the corporation, as in all other transactions and negotiations with the Government. The Court accepts as true the testimony of Mr. Evins that he did not know at the time of signing the waivers that (if such fact could be conceded to be true) [fol. 78] the waivers were filed after the statutory period of limitation had expired, and that he was not vested with authority (an erroneous conclusion of law, however) to execute them under such circumstances. We think it equally true that the representatives of the Government, who negotiated for the waivers, were likewise at the time under the impression that the limitation had not expired. The facts, however, upon which the opinions of representatives of both parties were based, were equally available to both sides. We again call attention to the fact that at the time the first waiver was filed, considerable uncertainty and divergence of opinion existed, both in the minds of the representatives of the Government and of the taxpayer, as to the power to execute and the effect of waivers and as to whether the statutory limitation related merely to the assessment of taxes or to both the assessment and collection. Subsequent statutory provisions operated to clarify these issues, but it was not until years afterwards that the Supreme Court decided in the case of Bowers v. New York & Albany Lighterage Company, supra, that the statutory period of limitation applied both to the assessment and collection, and in the case of Florsheim Bros. Dry Goods Co. v. United States, supra, that where a tentative return was permitted to be filed, the running of the statute did not begin until the filing of the subsequent completed return, and in the case of Stange v. United States, supra, that waivers filed after the expiration of the statutory period of limitation were valid. It must further be remembered

that the Government, in requesting waivers, was particular to enjoin on the taxpayer that they should be executed by the proper official and under proper authority. The Government did rely, and had a right to rely, upon the assumption that these instruments were properly executed under delegated authority. In this view the corporation acquiesced until 1928, a period of approximately five years. Whatever immediate action for levy and collection the Government might otherwise have taken was foregone. The corporation not only ratified the authority of its president and treasurer, through whom it acted exclusively at all times, but also from time to time made the payment of additional assessments without demurrer. Whatever may be the rule in other respects, it has been firmly established [fol. 79] by the Supreme Court that statutes limiting the time for action by the Government in collecting its taxes are to be strictly construed in its favor. DuPont de Nemours Powder Co. v. Davis, 264 U. S. 456, 44 S. Ct. 364; Bowers v. New York & Albany Lighterage Co., supra. "Taxation", as said by Judge Hutcheson, speaking for the Circuit Court of Appeals of the Fifth Circuit, in Independent I. & C. Storage Co. v. Commissioner, 50 F. (2d) 31, "is eminently practical", quoting from Tyler v. United States, 281 U. S. 503, 50 S. Ct. 356, 74 L. ed. 991, 69 A. L. R. 758. "It has to do with matters the great majority of which ought to be, and usually are, disposed of informally, and where rights are substantially preserved, defects in form may not defeat them", and courts will not permit a too technical construction "to defeat a waiver voluntarily executed within the scope of the implied powers of him who executed it, and which was acted upon by the officer of the United States to whom it was addressed". See also Florsheim Bros. Dry Goods Co. v. United States, supra; Aiken v. Burnet, 282 U. S. 277, 51 S. Ct. 148, 75 L. Ed. 338; Brown v. Burnet, 282 U. S. 283, 51 S. Ct. 140, 75 L. Ed. 343; Burnet v. Railway Equipment Co., 282 U. S. 295, 51 S. Ct. 137, 75 L. Ed. 349; Greylock Mills v. Commissioner, 31 F. (2d) 655; Moyer v. East Shore Terminal Co., 41 S. C. 300, 19 S. E. 651, 25 L. R. A. 48; Trustees for Ohio & Big Sandy Coal Co. v. Commissioner, 43 F. (2d) 782; United States v. Southern Lumber Co., 51 F. (2d) 956; J. P. Stevens Engraving Co. v. United States, 53 F. (2d) 1; Concrete Engineering Co. v. Commissioner, 58 F. (2d) 566; Philip Carey Mfg. Co. v. Dean, 58 F. (2d) 737.

Counsel for plaintiff earnestly, and we may add with considerable force of authority, allege that the implied power of an executive officer to execute waivers under the circumstances surrounding the cases above cited, falls short with clothing him with such authority in cases where the right sought to be waived has already been barred by the limitation of the statute. In each case, however, the surrounding circumstances must be taken into consideration in determining that issue. To apply the rule in the instant case would require us to declare invalid a waiver executed in accordance with a request addressed to the [fol. 80] corporation, stating that "it must be signed by such officer or officers as are empowered under the laws of the state in which the corporation is located to sign for the corporation, in addition to which the seal, if any, of the corporation must be affixed". In view of the fact that the receipt of this request carried notice to the corporation; that the officer who signed had custody of and affixed the seal of the corporation; that he was throughout a long period of years the sole representative of the corporation in all its dealings with the Government in making returns, paying taxes, filing claims for abatement and refund; and that the corporation knowing, as it must be presumed to have known, of all these facts and of defendant's reliance upon the waivers, acquiesced in what was done and accepted the benefits that arose or were expected from such reliance thereon; in view of all these facts, the corporation must conclusively be presumed to have ratified what was done by its president and treasurer. The validity of the waivers is, therefore, sustained.

For the reasons hereinbefore set forth, the plaintiff is not entitled to a recovery, and the complaint must be dismissed.

(Sgd.) H. H. Watkins, United States District Judge.

Anderson, S. C., January 31, 1933.

In United States District Court

[Title omitted]

Order for Judgment

This case having come on for trial before me, and having been duly heard upon the testimony and stipulation of

[fol. 81] facts, and having been duly argued by counsel for both parties, and the issues having been determined in accordance with the opinion this day filed. it is, therefore, after due consideration,

Ordered and adjudged, that plaintiff recover nothing upon its complaint herein; that the same be dismissed; and that the defendant have judgment against the plaintiff for the costs of this action.

H. H. Watkins, United States District Judge.

Anderson, S. C., January 31, 1933.

In United States District Court

[Title omitted]

Order Vacating Judgment

Upon motion of Plaintiff's Attorney, consented to by Defendant's Attorney, the Order for Judgment, dated January 31, 1933, is hereby revoked, set aside, vacated and annulled, the same being done at the term of Court at which said Order was signed and entered.

This 2nd day of February, 1933.

H. H. Watkins, United States District Judge. W. A. Sutherland, Attorney for Plaintiff. Joseph A. Tolbert, Attorney for Defendant.

[fol. 82] In United States District Court, Western District of South Carolina

L-1498

Clifton Manufacturing Company, a Corporation, Plaintiff,

vs.

The United States, Defendant

Order for Judgment

This case having come on for trial before me, and having been duly heard upon the testimony and stipulation of

facts, and having been duly argued by counsel for both parties, and the issues having been determined in accordance with the opinion heretofore filed, it is, therefore, after due consideration,

Ordered and adjudged, that Plaintiff recover nothing upon its complaint herein; that the same be dismissed; and that the Defendant have judgment against the Plaintiff for the costs of this action, to each of which rulings, orders and judgment Plaintiff excepts, and the exceptions are allowed.

This 25th day of April, 1933.

(Signed) H. H. Watkins, United States District Judge.

In United States District Court

Bill of Exceptions—Filed April 25, 1933

Be it remembered that the above entitled cause came on for trial on the 30th day of September, 1932, at Anderson, South Carolina, before his Honor, H. H. Watkins, District Judge, sitting as a Judge of said Court, without a jury, [fol. 83] said case being a suit against the United States to recover taxes alleged to have been erroneously and illegally assessed and collected for the fiscal year ended March 31, 1918, which said cause of action is more specifically set forth in Plaintiff's original petition and amendments thereto.

The Plaintiff was represented by Horace L. Bomar, Spartanburg, South Carolina, (on the petition) and W. A. Sutherland, E. Clem Powers and Joseph B. Brennan, all of Atlanta, Georgia.

The Defendant was represented by Joseph A. Tolbert, United States Attorney, Greenville, South Carolina, and W. F. Evans, of the Office of the General Counsel, Bureau of Internal Revenue, Washington, D. C.

At the trial of the case before the Judge without the intervention of a jury as aforesaid, on the 30th day of September, 1932, Plaintiff put in evidence a partial stipulation of facts, with the explanation with reference to Paragraph 8 thereof that it is understood by both parties that Plaintiff makes no admission of the authority of the officer who signed and filed waivers or purported to sign and file waiv-

ers on behalf of the taxpayer corporation. Said partial stipulation of facts is as follows:

"PART STIPULATION OF FACTS

"It is agreed between the parties that the following facts shall be considered as true in the consideration of the issues involved; but any additional testimony concerning the same may be introduced by either party not contradictory thereof, and testimony may be introduced in reference to other facts not agreed upon pertinent to the matters at issue:

"1. The Plaintiff corporation, Clifton Manufacturing Company, filed its original returns under the Revenue Act of 1917, for the fiscal period April 1st, 1917, to March 31, 1918, on May 28, 1918, showing a tax due of $171,002.96. This tax was paid September 11, 1918.

[fol. 84] "2. After the passage of the Revenue Act of 1918, said corporation filed an additional return covering the period ending March 31, 1918, on April 29, 1919, showing additional tax due of $50,638.75. This tax was paid, $13,690.65 March 21, 1919, and $36,948.10 September 15, 1919.

"3. An additional assessment of tax was made for said fiscal period against said corporation June, 1919, and paid June 16, 1919.

"4. An additional deficiency assessment of tax for said fiscal period was made against the said corporation May 1921, and paid as follows: $1,124.35 March 15, 1923; $1,665.96 Sept. 1926; $99,629.95 October 15th, 1926 and interest of $31,147.32.

"5. September 4, 1926, an additional deficiency assessment was made against the said corporation in the amount of $37,313.46, and interest to the amount of $1,174.61. In reference to this assessment, a deficiency letter was mailed to taxpayer May 26, 1926, and no appeal was taken to the Board of Tax Appeals. This tax was paid October 15th, 1926.

"6. July 7, 1921, said taxpayer corporation filed a claim for abatement for $80,800.12 of the amount of $102,420.26 assessed May, 1921. This claim was not allowed.

"7. Claim for refund to the amount of $175,000.00 for the period ended March 31, 1918, was filed September 20, 1928, assigning among other things for basis of claim amounts collected in October, 1926, were barred by statute of limitation applicable thereto. The claim was rejected October 24, 1929.

"8. Waivers were filed by said taxpayer corporation in form and words set forth in Exhibits "E", "H", "J", "K" and "L" of Plaintiff's complaint, on the dates appearing thereon; this statement being made subject to evidence to be introduced by Plaintiff supporting its attack upon said waivers alleged in the complaint."

[fol. 85] The foregoing stipulation was signed by the attorneys for Plaintiff and Defendant and received in evidence as Plaintiff's Exhibit No. 1.

It was further agreed by counsel in open Court that John F. Jones, former Collector of Internal Revenue for the District of South Carolina, was the Collector to whom the taxpayments here involved were made and that at the time of the bringing of this action the said John F. Jones was out of office.

Plaintiff then put in evidence the deposition of James G. Bright, former Deputy Commissioner of Internal Revenue, it appearing that said deposition was taken by consent of the parties, and that all formalities with reference thereto had been waived. The sworn testimony of JAMES G. BRIGHT, as contained in said deposition, reads as follows:

Direct examination.

By Mr. Sutherland:

"My name is James G. Bright. My address is 1514 Barnett Building, Jacksonville, Florida. I was Deputy Commissioner of Internal Revenue from July 1923 until October 1929. In June 1923 I was Assistant Deputy Commissioner. I was Acting Deputy Commissioner from approximately the latter part of May or the first part of June until the first of July. In June as Deputy Commissioner and Acting Deputy Commissioner of Internal Revenue I

had charge of the Washington force and field force of the Income Tax Unit of the Internal Revenue Bureau. I was head of the Income Tax Unit as it was called. I also had charge of excess profits taxes. They were treated the same as income taxes. During my term as Deputy Commissioner and Acting Deputy Commissioner I was the only Deputy Commissioner assigned to the Income Tax Unit. During my term of office as Deputy Commissioner and Acting Deputy Commissioner, it was the policy of the Bureau to request taxpayers to file waivers of the statute of limitations where the Government felt that its interests would be [fol. 86] jeopardized through the running of the statute. It was the policy of the Bureau or Section Chiefs and the Division Chiefs to address letters to taxpayers under my signature, requesting waivers, or other matters pertaining to the audit of income tax return. As I stated before, where the interests of the Government were jeopardized, the Government requested taxpayers to furnish waivers, and by that, I mean where the statute was about to run, and an investigation showed that a taxpayer owed taxes, and it was desirable to give the taxpayers an opportunity of presenting evidence to show that he did not owe the tax claimed by the Government; the Government gave him a right under the law to file a waiver of the statute, with the consent of the Commissioner of Internal Revenue. This was done because the taxpayer, in filing claims for refund against the Government, could not expect the Government to consider such claims where the statute had run, neither would the Government request a taxpayer to file a waiver in those cases where the statute had run. There was no written order to any Section Chiefs covering the condition under which he might or might not request waivers from taxpayers, but in conference with Sections Chiefs, concerning the administration features of the Bureau, it was the well established policy that no Section Chief should request a waiver of the statute of limitations from a taxpayer in cases where the statute had expired. There were cases that came to my attention where the statute had expired, and investigation showed that there was still taxes due, and in such cases, the taxpayer's attention was called to the fact that the statute had expired, and they were then requested to file waivers so as to give both they and the Government an opportunity to go into the merits of the case. It was not

the custom of the Bureau to request waivers of taxpayers, where the statute of limitations had expired."

Q. "State whether or not it was made clear by you to your subordinates that in asking taxpayers for such waivers when they thought the statute of limitations had already run, it was their duty to advise the taxpayer of the expiration of the Statute?"

A. "I answered that in reply to one above, to the effect [fol. 87] that Section Chiefs and Division Heads had been instructed not to request taxpayers to file waivers."

The witness continuing:

"Those instructions were thoroughly understood. The letter, copy of which is attached as Exhibit D to the petition filed in this case and which you now show me, is not the kind of letter that would have been sent out by my subordinates in asking for such waiver, where my subordinates thought that the statute had already expired. It is not the kind of letter that would be sent out to a taxpayer where the statute had expired. I mean where the Unit thought the statute had expired. I know nothing about the facts in this case as to whether the statute had run or not. With reference to the letter, copy of which is attached to the petition in this case as Exhibit G, and which you now show me, this also is not the type of letter that would be forwarded to a taxpayer where the statute had expired, but is a type of letter requesting waivers to be filed where the statute had not expired. The same answer applies to the letter which is attached to the petition as Exhibit I."

Q. "I hand you herewith a letter sent out under your name under date of May 15, 1924, addressed to Mr. Charles A. Holman, which I ask to have marked as Exhibit 1 to these depositions, and ask you whether or not that is the kind of letter which your subordinates were instructed to write in the event that they wished to request a waiver after the statute had already expired, or after they felt the statute had already expired?"

A. "This is the type of letter I have explained heretofore."

The letter dated May 15, 1924, addressed to Mr. Charles A. Holman, which was marked as Exhibit 1 to this deposition of James G. Bright, reads as follows:

EXHIBIT 1

[fol. 88] "Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue, and refer to IT:PA-5, CTN-505.

May 15, 1924.

Mr. Chas. A. Holman, Savannah, Georgia.

SIR: An examination of your 1918 income tax return discloses an additional tax liability for that year of $2,034.06.

The five-year period provided in Section 250(d) of the Revenue Act of 1921, within which assessment of the additional tax for 1918 may be made on your return, has expired. In order that an assessment of any further tax may be made, it will be necessary for you to sign and return to this office the enclosed form of waiver consenting to the assessment and collection of this tax irrespective of the period of limitations having expired. If you do not care to sign the waiver, but are willing to pay the tax, you may forward a check for the amount to the Collector of Internal Revenue for your district.

If you think that any part of the adjustment of your return is incorrect, the signing of the waiver will not obligate you to pay the tax before opportunity is given you to present your exceptions and to have them considered by this office.

Please advise this office within fifteen days of the action you will take in this matter.

Respectfully, J. G. Bright, Deputy Commissioner,
by A. Lewis, Head of Division."

Enc.: Waiver Form.

[fol. 89] The witness continuing:

"The same rules which I had given my subordinates to govern them in requesting waivers by letter applied to requests for waivers made in conference."

Cross-examination.

By Mr. Evans:

"There were occasions when the Bureau asked for waivers after the period of limitations had expired. In many instances there was considerable question, both of law and fact, at times in reference to a particular case, whether or not the statute had expired, in the early years of investigation of income tax and excess profits tax cases, particularly so up until the passage of the 1924 Act, at which time Congress clarified the position of waivers on both assessment and collection. With reference to tax periods or fiscal periods ending in 1918, subject to the Revenue Act of 1918, there was an excess profits tax return and an income tax return. There was some doubt in the minds of the officials of the Bureau on the expiration of the statute of limitations with reference to the 1918 returns filed as amending their original return filed under the 1917 law. In reference to cases where claims in abatement were pending in reference to a tax, there was a question in the minds of the officials of the Bureau as to whether or not that did not stay the running of the statute, which was clarified by the 1924 Act. I am familiar with the decision in what is known as the New York-Albany Lighterage case. Prior to that decision, it was not wholly the opinion in the Bureau that the statute of limitations did not affect the power of the Collector to distrain, to collect by distraint. The General Counsel's office had advised the Commissioner that there was a possibility that the courts would so hold in the event a case was brought to suit, prior to the rendering of the decision by the Supreme Court. I have no personal recollection or knowledge whatever in reference to this particular taxpayer, the Clifton Manufacturing Company. It was not generally the custom of the Commissioner to [fol. 90] formulate and issue written regulations in reference to matters of this kind, matters of procedure. They were more or less brought out in conference meetings of the Commissioner with the Deputy Commissioner and the Section Chiefs."

Plaintiff then put in evidence the deposition of Leo Speer, of the Office of the General Counsel, Bureau of In-

ternal Revenue, it appearing that said deposition was taken by consent of the parties and that all formalities with reference thereto had been waived. The sworn testimony of LEO SPEER as contained in said deposition reads as follows:

Direct examination.

By Mr. Sutherland:

"My full name is Leo Speer. I am now employed in the office of the General Counsel Bureau of Internal Revenue. I was employed in the same place in November 1925. In November 1925 I was employed in the Review Department, Internal Revenue Bureau. The Review Division was at that time rendering opinions on issues submitted by the Income Tax Unit on questions as to the amount of tax liability due from corporations, individuals, etc., that is, income and excess profits tax liability. I did hold a conference in the case of Clifton Manufacturing Company, Clifton, South Carolina, at or about November 1925. That is the only conference at or about that time that I recall. I don't recall whether or not I requested a waiver of the statute of limitations at that conference. I can't say that I did or did not. As I recall, it was the general practice at that time in cases in which I held conferences to request waiver of the statute of limitations if the statute, or the statute as extended by previous waiver, was about to expire at the time the conference was held, if that matter came to my attention. I have on occasion requested waivers under those circumstances. I don't recall any cases of having requested waivers where I thought the statute of limitations, or the statute as extended by previous waivers, had already expired at the time of the request for the additional waiver. I cannot say that I am really very [fol. 91] familiar with the general practice of the Bureau with reference to the question of waivers in cases where the Government thought the statute of limitations had run at the time the waiver was requested, inasmuch as practically all waivers—or inasmuch as most waivers, were requested by the Income Tax Unit. In other words, that was primarily an administrative policy rather than a question of legal procedure. Frankly, as I previously stated, my experience in requesting waivers was somewhat limited,

due to my position in the office; but to my knowledge it has never been the practice to deceive the taxpayer in any way as to the true situation in the case. Of course I would have followed the procedure of the Bureau in such matters. Under the procedure of the Bureau, as I recall it, such information would have been given. Due to the lapse of some seven years I have no personal recollection whatever with reference to the question of waiver in this particular case of the Clifton Manufacturing Company."

Cross-examination of Mr. Speer was waived by Mr. W. F. Evans, attorney for the Defendant.

The plaintiff then called J. C. Evins, as a witness in its behalf, who testified, under oath, as follows, to-wit:

Direct examination.

By Mr. Sutherland:

"I am J. C. Evins of Spartanburg, South Carolina. I am President and Treasurer of Clifton Manufacturing Company, Clifton, South Carolina, and have been since May, 1916. As Treasurer of the Company I was in charge of tax matters. I received the letter of June 21, 1923 which you show me and a copy of which is attached to the petition as Exhibit B. From a consideration of that letter at that time I understood that the statute of limitations had not run in connection with additional taxes of the Clifton Manufacturing Company for 1918. I so interpreted that letter. I understood from the letter that the statute of limitations had not expired and gave the waiver of June [fol. 92] 25, 1923 under that impression. I certainly did not intend to waive any right that we had as to that. With reference to the effect of the waiver, I thought that I was simply complying with a formality of the Government. If I had known that the statute of limitations had already run in June 1923 I would have felt that I had no right to execute the waiver. I certainly would not have done it.

"The letter dated January 12, 1924 which you show me, and a copy of which is attached to the petition as Exhibit G, was received by me. I interpreted this letter in the same way that I interpreted the last. When I gave the

waiver of January 19, 1924, which is attached to the petition as Exhibit H, I gave it under the same impression under which the waiver of June 1923 was given. That is true as to all of these waivers. And I interpreted the Government's letter of December 3, 1924 in the same way as I interpreted the two preceding letters. And I gave the waiver under the same impression.

"With reference to the last waiver of November 18, 1925, which is attached to the petition, marked Exhibit L, my recollection is that it was in conference in Washington that it first came up, when Mr. Roberts and myself were present, and it was, I think, requested by Mr. Speer, who, I think, was the Government's representative at that time. I presume it was Mr. Leo Speer. At the time Mr. Speer requested that waiver he did not mention anything to us about the statute being open. I have no distinct recollection as to whether he told us the purpose or why he wanted that waiver. Just to sustain the Government's right, I suppose. I thought the Government had a perfect right to ask for these waivers when I gave them. I certainly would not have given the waiver if I had thought that there was any question of the statute having run. With reference to my authority, I previously stated that I would have thought I had no right to give any waiver or any right the Clifton Manufacturing Company had.

"The original income and excess profits tax returns filed in May 1918 were certainly filed in good faith and the honest belief that they represented the true statement of the income and invested capital of the Company.

[fol. 93] "At no time between the receipt of this letter of June 25, 1923, and the filing of the last waiver in November, 1925, did any one call our attention, or did we discover in any way the possibility that there may have been any misrepresentation made to us or that we may have been mistaken of the fact that the statute had run at the time we gave these waivers."

Cross-examination.

By Mr. Evans:

"Prior to the time the first waiver was given the auditing firm of S. H. Boyd in Washington was employed by us to handle our matters. Prior to 1923 we had Cooley &

Marvin also brought into the case. I think Mr. Boyd was our attorney at the time this waiver was given. I cannot say that the waivers in question were sent to Mr. Boyd to send to the Commissioner. I have looked for correspondence and cannot find it. It is not in my file. At that time I consulted Mr. Boyd in reference to our tax matters. I don't think I had previously asked the Department for a special assessment but I could not be clear upon that. At the time the first waiver was given there were negotiations by our Company and the Bureau with reference to our tax matters. I had Mr. Boyd's advice and conferences with him in Washington with reference to these matters. He held our power of attorney. I did not consult with him as to when the periods of limitations would expire. At that particular time I did know something about the period of limitations. I inferred from the letter of the Government that there must be some period of limitation but never looked into the law about it. I don't have any clear cut recollection of the matter but I assume that Mr. Boyd would have advised us. When I received that letter I cannot find that I made any inquiry whether or not that was true. I have looked. Prior to that time Cooley & Marvin had filed a claim for abatement of $80,000.00 of the tax for us. I could not say that I had any clear understanding of the legal effect of that claim for abatement as to the statute of limitations, whether it stayed or stopped it or rested it. I did not inquire as to when the statute began. I presumed from the Government's letter that they had a right [fol. 94] to exact that extension and I therefore acted on that letter under that impression. The letter doesn't seem to refer to the statute of limitations or period within which the Government could act. I don't know anything about whether or not there was a division as to whether or not the Government was controlled by limitations in reference to collecting by distraint. I signed the waiver merely on the Government's letter, which I interpreted to be a right which the Government had to exact. I have no recollection of having made an effort to find out otherwise. I am fortunate in not having had very much litigation, but in matters of taxes I did make it a rule to consult attorneys, as a rule. But this letter was so clear that they had a right, I have nothing in my files to show that I consulted Mr.

Boyd or someone else. Generally I did not sign any other papers without consulting them. Mr. Boyd made up some of the earlier returns of the Company."

Redirect examination.

By Mr. Sutherland:

"I felt that the Government was legally entitled to make a request of that kind. I didn't know anything about the law in the matter. The Government's letter of June 21, 1923, together with the waiver of June 25, 1923, indicated to me that there was a definite time within which the Government must assess income and profits taxes. I don't know whether Mr. Boyd was a lawyer. I understood he was a lawyer and a tax man. I don't know whether he had any legal training or not. If I had known that the statute had expired of course I would not have thought that the Government had a right to exact the waiver."

Recross-examination.

By Mr. Evans:

"The Government letter of June 21, 1923, refers to a Section of the Revenue Act. I did not know what that Section of the Revenue Act referred to. I have no correspondence to show that I referred this to any tax expert. I had no access to the Act. I thought the Government was [fol. 95] within its rights and didn't think it necessary. If the Government asked me to sign a waiver I realized there was some reason they wanted the waiver signed. I read the waiver before signing it. It did not occur to me that possibly I was waiving any of the rights of the Company. It was called a waiver and I knew what a waiver meant. As far as I can find out I signed it without consultation with any one."

The Plaintiff then called DEARING S. ROBERTS as a witness in its behalf, who testified, under oath, as follows, to-wit:

Direct examination.

By Mr. Sutherland:

"My address is Boston, Massachusetts. I am an accounting engineer, auditor, Cooley & Marvin. I have had charge a good many years of the tax department of Cooley & Marvin. I was admitted to practice before the Department, I think possibly in 1919. In 1925 we were handling the tax matters of Clifton Manufacturing Company in connection with Mr. Boyd in Washington. I remember having a conference with Mr. Speer in 1925. Those present were Mr. Speer, representing the Review Division of the Office of the General Counsel, Mr. Evins, Mr. Boyd and myself. I think Mr. Chase of our firm was there also. Toward the latter part of the conference Mr. Speer stated that the waivers on file would expire in the near future, before he would have time to finish the case, and asked us for new waivers to extend the then present waivers so that the statute would not run while he was reviewing the case. I advised Mr. Evins to give the waivers. At the time I gave that advice I thought that the statute was still open on account of the previous waiver. I would certainly not have advised the giving of the additional waivers if I had thought the statute had run. I would have advised not to give the waivers if there had been any question whatever about whether the statute had run.

"I have checked the returns filed in May 1918 under the 1917 Act and the returns filed in April 1919 under [fol. 96] the 1918 Act, and I do not find that there is any information on the second return that was filed that is not contained in the first return of this under the Revenue Act of 1917; that the tax computed under the Revenue Act of 1918 could be computed from the information filed in the first return. I referred to the tax computed by the taxpayer and not the Government, on his first return.

"In the conference with Mr. Speer, Mr. Speer did not state that there was any question about the statute of limitations having already expired. With reference to claims for special assessment on refund claims as compared to protests on special assessment, in my experience I never had any different consideration of a claim for assess-

ment, that is a brief or presentation of facts before assessment, than on a claim for refund."

Cross-examination.

By Mr. Evans:

"I am licensed to practice before the Bureau but not before the Board of Tax Appeals. I am familiar with the New York Lighterage case. I presume that up to the time of that decision the practice in the Department was to contend that while it might not bring a suit at law with reference to taxes it could collect by distraint, regardless of the statute of limitations. I would never advise a client to sign a waiver because of any feeling that while a taxpayer by refusing to sign a waiver might rid himself of a suit in court it might be met eventually by collection by distraint.

"From an examination of the 1917 and 1918 returns, the facts disclosed in one are disclosed in the other. I think the same figures—I think they are identically the same. My recollection is that most of the changes under the 1918 law were to clarify uncertainties in the 1917 law. The 1918 law did make a change on the question of tangible and intangible properties—that's the clarification, but the mistake was made in the 1917 Act. In this particular case from the information on the 1917 return, I would not consider there would be anything to change it under the 1918 Act. In this particular case, there is nothing to indicate that the return under the [fol. 97] 1917 Act did not exclude the proposition that properties under this invested capital might be subject to the regulations of the 1918 Act, particularly in view of the change as to invested capital. It would be highly improbable that such was the case here. I would not hesitate to make up the 1918 return, that is, the return under the Revenue Act of 1918, from the information in the 1917 return, and advise the taxpayer to file it on that basis without even looking at the books. I think that it would be perfectly safe to do that in this case. After the Commissioner had received the 1917 return, and after the 1918 Act had come into effect, he could have computed the tax under the 1918 Act in accepting the Clifton Manufacturing Company's return of 1917. I think he could have safely done so in the absence of a verification as

found in the 1918 return. He held the balance sheet. The Company's schedules had balance sheets. I don't think that it would take the 1918 return to exclude the possibilities which might have arisen, because you have attached to your 1917 return the balance sheet. Here is a balance sheet signed by a certified public accountant, which would indicate that the possibilities you speak of are not there, in the Clifton Manufacturing Company case. There is no such item. I should think that that would be true in reference to all matters or change in the 1918 Act. I know that the rules of the Department required all corporations to file a new return when the 1918 Act was passed."

Redirect examination.

By Mr. Sutherland:

"There was a field examination ordinarily made where the net income was over $50,000.00. I think that was the ordinary practice. Ordinarily these returns would not have been accepted without a field examination."

Thereupon the Plaintiff rested. Defendant then offered in evidence the following documentary evidence:

[fols. 98-104] Defendant's exhibit 1 omitted, see exhibits "A" & "B", printed side pages 19-22, ante.

[fol. 105] DEFENDANT'S EXHIBIT 2

Form 1120—United States Internal Revenue Service

Corporation Income and Profits Tax Return

For Fiscal Period Begun March 31, 1917, and Ended March 31, 1918

Corporation's Name and Principal Place of Business: Clifton Manufacturing Company, Clifton, S. C.

Schedule I—Net Income

Item	1911	1912	1913
1. Net income for each prewar year (as finally determined in income return)	$33,568.30	$215,585.32	$143,737.51
2. Plus amount of corporation excise tax paid in each year	22.73	2,455.12	1,116.80
3. Totals for 1911, 1912, and 1913	33,591.03	218,040.44	144,854.31
4. Less dividends received in 1913	.....	.....	.....
5. Net total for 1913	.....	.....	144,854.31

[fol. 106]

6. Average net income for prewar period (sum of items on line 3 for 1911 and 1912 and item 5 for 1913, divided by number of years	132,161.93
7. Net income for taxable year (Item 25, Schedule A, page 2)	652,402.72

Schedule II—Invested Capital

Item	1911	1912	1913	Taxable Year
1. Capital, surplus, and undivided profits at the close of the preceding year as shown by corporation's books before any adjustments are made therein (from Schedule E)	$1,477,971.76	$1,614,575.31	$1,717,137.14	$1,939,857.07
2. Plus adjustments by way of additions (from Schedule F)	356,590.03	356,590.03	356,590.03	356,590.03
3. Total	$1,834,561.79	$1,971,165.34	$2,073,727.17	$2,296,447.10
9. Invested capital for each year	1,834,561.79	1,971,165.34	2,073,727.17	2,296,447.10
Average invested capital for prewar period (sum of items on line 9 for 1911, 1912 and 1913 divided by number of years				1,993,151.43
Increase of decrease in invested capital for taxable year compared with prewar invested capital				303,295.67

[fol. 107] Schedule III—Excess-Profits and War-Profits Credits

Excess-Profits Credit

1. Eight per cent of invested capital for taxable year (Item 9 last column, Schedule II)	$183,715.77
2. Exemption ($3,000)	3,000.00
3. Excess-profits credit (Item 1 plus Item 2)	186,715.77

War-Profits Credit

4. Average net income for pre-war period (Item 6, Schedule I)	$132,161.93
5. Plus 10% of increase or minus 10% of decrease shown by Item II, Schedule II	30,329.57
6. (a) Total of (or difference between) Items 4 and 5, or (b) 10% of invested capital for taxable year (Item 9, last column, Schedule II), whichever is larger	229,644.71
7. Exemption ($3,000)	3,000.00
8. War-Profits Credit (Item 6 plus Item 7)	232,644.71

Schedule IV—Computation of Taxes

War-Profits and Excess-Profits Tax (Brackets One and Two)

1 Brackets	2 Amount of net income (Item 7, Schedule I) in each bracket	3 Excess-profits credit (Item 3, Schedule III)	4 Balance subject to tax	5 Rate	6 Amount of tax
1. Not over 20% of invested capital.	$459,289.42	$186,715.77	$272,573.65	30%	$81,772.09
2. Over 20% of invested capital	193,113.30	.....	193,113.30	65%	125,523.65
3. Totals	652,402.72	.....	.....	....	207,295.74

[fol. 108] War-Profits and Excess-Profits Tax (Bracket Three)

4. Net income for taxable year (Item 7, Schedule I)	$652,402.72	
5. Less amount of war-profits credit (Item 8, Schedule III)	232,644.71	
6. Balance	419,758.01	
7. Eighty per cent of item 6	$335,806.41	
8. Less Item 3 column 6 (if smaller than item 7)	207,295.74	
9. Tax in Bracket Three (Item 7 minus Item 8—if item 8 is the larger, make no entry)		128,510.67
10. Total war-profits and excess-profits tax as computed under Section 301(a) (Item 3 column 6 plus Item 9)	.....	335,806.41

Income Tax

12. Net income for taxable year (Item 7, Schedule I)		$652,402.72	
13. Less interest on obligations of U. S. not exempt (Item 4, Schedule A, page 2)			
14. War-profits and excess - profits tax (Item 10 or 11)	$335,806.41		
15. Exemption	2,000.00	337,806.41	
16. Balance subject to income tax (Item 12 less Items 13, 14 and 15)		$314,596.31	
17. Tax of 12% on Item 16			$37,751.56
18. Item 10 or Item 11 plus Item 17			373,557.97

[fol. 109] Adjustment of Tax for Fiscal Year Ended in 1918

21. That proportion of Item 20 which the number of months within the calendar year 1918 is of the number of months in the entire period	$93,389.49
22. That proportion of a tax computed under the Revenue Acts of 1916 and 1917 which the number of months within the calendar year 1917 is of the number of months in the entire period	128,252.22
23. Total tax (Item 21 plus Item 22)	221,641.71
24. Less total tax already paid for the fiscal year ended in 1918	171,002.96
25. Balance of Tax	$50,638.75
Paid: On submission of tentative return (1031T), $13,690.65	$13,690.65

We, the undersigned, president and secretary of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is to the best of

his knowledge and belief a true and complete return made in good faith pursuant to the Revenue Act of 1918 and the Regulations issued hereunder.

(Sgd.) J. C. Evins, President. (Sgd.) D. K. Anderson, Secretary.

Sworn to and subscribed before me this 28th day of April, 1919. (Sgd.) John B. Jackson, Notary Public for S. C. (Seal.)

[fol. 110] DEFENDANT'S EXHIBIT 3

Claim for Abatement

Taxes Erroneously or Illegally Assessed

STATE OF SOUTH CAROLINA,
County of Spartanburg, ss:

Clifton Manufacturing Company, Clifton, S. C.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant—Manufacture of Cotton Goods.
2. Character of assessment or tax—Income and Excess Profits Tax for fiscal year 1918.
3. Amount of assessment—$102,420.26.
4. Amount now asked to be abated—$80,800.12.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

The Agent was in error in his adjustment of depreciation taken for the period from 1904 to 1916, inclusive. In Memorandum 106, issued by the Commissioner of Internal Revenue since the Revenue Agent made his examination—which memorandum was for the guidance of the Income Tax Unit in the adjustment of depreciation for prior years—it is provided that where the assets were reasonably worth at the beginning of the taxable year the

amount at which they were carried on the books of the corporation, no further adjustment would be required.

It appears that the Agent was in error in his adjustment of stock in process in taking same on the basis of [fol. 111] the cost of cotton plus 80% of the cost of finished goods—the correct basis being the cost of cotton plus 50% of the cost of finished goods, this basis, we understand, having been accepted by the Department as reasonable and fair.

The original returns show stock in process taken at an arbitrary figure. The proper adjustments have been made in the amended returns in the inventory of stock in process, same being taken in accordance with Departmental regulations, at "cost" or "cost or market, whichever is lower".

We respectfully request the abatement of the above assessment, based upon the amended returns hereto attached, and if our Claim for Abatement is not approved, we hereby request that we be granted a hearing, at which time we may be heard in support of same.

(Sgd.) J. C. Evins.

Sworn to and subscribed before me this 6th day of July, 1921.

(Sgd.) H. K. Osborne, N. P. S. C.

The foregoing documentary evidence introduced by Defendant is being sent up to the Circuit Court of Appeals in its original form by special order of the District Court.

After the introduction of said documentary evidence, Defendant rested its case.

The foregoing was all of the evidence heard or admitted by either side in this case.

At the close of the evidence the Court announced that a reasonable time would be allowed to both sides for filing requests for findings of fact and conclusions of law and for making such motions as might be desired, and for noting exceptions and having the same allowed with reference to [fol. 112] the Court's action or failure to act in such matters, and that the trial of the case would continue from term to term for all of said purposes.

Thereafter, within the time allowed by the Court, Plaintiff submitted the following requests for findings of fact and conclusions of law.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT

Plaintiff respectfully requests that the Court make the following Findings of Fact:

1. At all times hereinafter mentioned the Plaintiff was, and still is, a domestic corporation, organized and existing under the laws of the State of South Carolina, with its principal office and place of business at Clifton, Spartanburg County, in the Spartanburg Division of the Western District of South Carolina.

2. On May 28, 1918 Plaintiff filed with the Collector of Internal Revenue for the District of South Carolina its income tax return on Form 1031 and its excess profits tax return on Form 1103, for the fiscal year ended March 31, 1918, both of which were duly executed and verified by Plaintiff in accordance with the law.

3. The principal information which was contained in the income tax return, on Form 1031, referred to in paragraph 2, has been set forth in Exhibit 3, attached to the petition in this case, which Exhibit is incorporated in these Findings of Fact by reference and made a part hereof.

4. The principal information which was contained in the excess profits tax return, on Form 1103, referred to in paragraph 2, has been set forth in Exhibit B, attached to the petition in this case, which Exhibit is incorporated in these Findings of Fact by reference and made a part hereof.

5. The income and excess profits taxes shown by said returns, referred to in paragraph 2, amounting to $171,002.96, were paid by Plaintiff to the Collector of Internal Revenue [fol. 113] for the District of South Carolina on September 11, 1918.

6. Pursuant to the requirement of Treasury Decision No. 2797 (dated March 11, 1919), Plaintiff on April 29, 1919 filed with the Collector of Internal Revenue for the District of South Carolina an amended income and profits tax return, on Form 1120, for the fiscal year ended March 31, 1918.

7. The amended return, referred to in paragraph 6, contained the same information with reference to the amount of net income and invested capital for the pre-war years

(1911, 1912 and 1913), and the same information with reference to the amount of invested capital for the fiscal year ended March 31, 1918, as was contained in the original income and profits tax returns referred to in paragraph 2. The amount of net income for the taxable year, the fiscal year ended March 31, 1918, was shown in the amended return, referred to in paragraph 6, to be the sum of $652,402.72, which sum was also shown to be the amount of net income subject to excess profits tax in the excess profits tax return referred to in paragraph 2. The total net income shown to be subject to income tax on the income tax return, referred to in paragraph 2, was $652,525.30, which amount exceeded the amount shown as taxable net income in the amended return, referred to in paragraph 6, by the sum of $122.58.

8. The said sum of $122.58, referred to in paragraph 7, as the amount by which the item of taxable net income shown in the original income tax return, referred to in paragraph 2, exceeds the item of taxable net income shown in the amended return, referred to in paragraph 6, represented the amount paid by the taxpayer during the taxable year as interest on money borrowed for the purchase of liberty bonds. This sum, with the explanation thereof, is shown in "Schedule 6" on the "Supplementary Statement" attached to the income tax return, referred to in paragraph 2. It also appears in Schedule I of the original excess profits tax return, referred to in paragraph 2, that this amount of $122.58, representing interest paid on indebtedness incurred for the purchase of obligations of the [fol. 114] United States issued since September 24, 1917, and held by the corporation in excess of $5,000.00 par value, was deducted from net income for the taxable year as shown in the original income tax return, referred to in paragraph 2, in order to arrive at the amount of net income subject to excess profits tax.

9. The amended return, referred to in paragraph 6, showed an additional tax of $50,638.75 over and above the taxes shown on the original returns, referred to in paragraph 2, which additional tax resulted solely from the application of the revised rates provided by the Revenue Act of 1918, which was enacted after the original returns, referred to in paragraph 2, were filed.

10. The additional tax in the sum of $50,638.75, referred to in paragraph 9, was paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina, $13,690.65 on March 21, 1919 and $36,948.10 on September 15, 1919.

11. Original income and excess profits tax returns, referred to in paragraph 2, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912, and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918 and the Revenue Act of 1917, and the Revenue Act of 1916 as amended, provided that the items referred to had been accepted by the Commissioner as correct.

12. The amended income and excess profits tax returns referred to in paragraph 6 did not contain any further information, in addition to the information disclosed in the returns referred to in paragraph 2, which would enable the Commissioner of Internal Revenue to make a more accurate determination or computation of Plaintiff's income and excess profits taxes under the Revenue Act of 1918. [fol. 115] All of the information disclosed in the amended returns, referred to in paragraph 6, which could be used for the computation of income and excess profits taxes under the Revenue Act of 1918 had already been disclosed in the returns, referred to in paragraph 2.

13. The original income and excess profits tax returns referred to in paragraph 2 were prepared and filed by Plaintiff in good faith and in the honest belief that all of the information therein contained was correct, and was intended as a complete and final return.

14. An additional assessment of $3,762.86 against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 was made by the Commissioner of Internal Revenue in June 1919, and was paid by Plaintiff on June 16, 1919.

15. In May 1921 the Commissioner of Internal Revenue assessed against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 an additional amount of $102,420.26, which was paid in the following amounts and on the following dates respectively: $1124.35 on March 15, 1923, $1665.96 on September 15, 1926 and $99,629.95 on October 15, 1926, with interest on this last amount in the sum of $31,147.32.

16. On September 4, 1926 an additional assessment was made against Plaintiff for the fiscal year ended March 31, 1918 in the sum of $37,313.46 principal, and interest in the sum of $1174.61. This tax and interest in the total amount of $38,488.07 was paid on October 15, 1926.

17. On July 7, 1921 Plaintiff filed a claim in abatement for $80,800.12 of the amount of $102,420.26 which had been assessed in May 1921. This claim was not allowed.

18. On or about October 24, 1929 the Commissioner of Internal Revenue issued a certificate of overassessment, for the fiscal year ended March 31, 1918, in the sum of [fol. 116] $7,877.78 principal, and $247.91 interest, or a total of $8,125.69, which sum, together with interest thereon, was refunded to Plaintiff.

19. A claim for refund in proper form, setting forth the ground of the present suit, was filed with the Collector of Internal Revenue on September 20, 1928 and was rejected on October 24, 1929. This suit was commenced on October 13, 1931.

20. On June 21, 1923 the Commissioner of Internal Revenue addressed and sent to Plaintiff a letter requesting Plaintiff to execute a form of waiver which had been prepared by the Commissioner, and which had been enclosed with said letter. This so-called form of waiver was signed under date of June 25, 1923 by J. C. Evins, President and Treasurer of Plaintiff, and was filed with the Commissioner under the circumstances described below.

21. On January 12, 1924 the Commissioner of Internal Revenue addressed and sent to Plaintiff another letter requesting Plaintiff to execute a second form of waiver which had been prepared by the Commissioner, and which had been enclosed with said letter. This so-called form of waiver was signed under date of January 19, 1924 by J. C.

Evins, President and Treasurer of Plaintiff, and was filed with the Commissioner under the circumstances described below.

22. On December 3, 1924 the Commissioner of Internal Revenue addressed and sent to Plaintiff a letter requesting Plaintiff to execute a third so-called form of waiver, which had been prepared by the Commissioner, and which had been enclosed with said letter. Two copies of this so-called form of waiver were signed under date of December 4, 1924 by the said J. C. Evins, and were filed with the Commissioner under the circumstances described below.

23. In November 1925 the Commissioner requested Plaintiff to execute a fourth so-called form of waiver which had been prepared by the Commissioner. Said so-called [fol. 117] form of waiver was signed under date of November 18, 1925 by J. C. Evins, President and Treasurer of Plaintiff, and was filed with the Commissioner under the circumstances described below.

24. In the letters from the Commissioner to Plaintiff dated June 21, 1923 and January 12, 1924, just described, the Commissioner represented to Plaintiff that the statute of limitations for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired. In the letter from the Commissioner to Plaintiff, dated December 3, 1924, just described, the Commissioner represented to Plaintiff that the statute of limitations (as extended by prior waivers) for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired. The Commissioner's agent who requested the so-called waiver of November 18, 1925 also represented to Plaintiff that the statute of limitations (as extended by prior waivers) for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired. All of said representations were false and misleading in that at the time they were made said statute of limitations had already expired and the preceding waivers were invalid because executed under mutual mistake and misrepresentation.

25. Said representations were made with the intention and purpose of causing Plaintiff to execute the waivers requested at the time said representations were made.

26. At the time of the execution of the purported waivers of June 25, 1923, January 19, 1924, December 4, 1924 and November 18, 1925, Plaintiff did not know that the statute of limitations had already expired and that any preceding waivers were invalid.

27. Neither the Government nor its officers nor agents knew of the falsity of said representations and all of the purported waivers, described above were executed under a mutual mistake as to the expiration of the statute of limitations (or the statute as extended by prior waivers).

[fol. 118] 28. But for the mutual mistakes and misrepresentations described above, the said J. C. Evins would not have undertaken to execute the so-called waivers described above, and the execution of said purported waivers resulted solely and proximately from said mutual mistakes and misrepresentations.

29. As a result of the purported execution of said instruments, Plaintiff received no consideration, benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistakes.

30. Plaintiff did not discover the falsity of any of the representations under which any of the above described forms of waiver were procured, nor did Plaintiff become aware of the mutual mistakes under which the Government and Plaintiff labored with reference to the expiration of the statute of limitations, and the invalidity of prior waivers, as described above, until after the signing and filing by J. C. Evins, President and Treasurer of Plaintiff, of the last of the so-called forms of waiver described above.

31. The said J. C. Evins, President and Treasurer of Plaintiff, had no authority to execute, on behalf of Plaintiff, a waiver of the statute of limitations on assessment and collection of income and profits taxes after the expiration of the period of limitation provided in the statute.

32. The Collector of Internal Revenue by whom the taxes described above, and interest thereon, were collected, and to whom said taxes and interest were paid, had ceased to hold said office of Collector of Internal Revenue at the time this suit was commenced.

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW

Plaintiff respectfully requests that the Court make the following special rulings of law.

1. The period of limitation on the assessment and collection of additional income and excess profits taxes, pro- [fol. 119] vided in Section 250(d) of the Revenue Act of 1921, Section 277(a) (2) of the Revenue Act of 1924, and Section 277 (a) (3) of the Revenue Act of 1926, begins to run, with respect to a fiscal year ended March 31, 1918, upon the filing of the original income and excess profits tax returns for that year, where such returns are made in good faith and without fraud or intent to evade the tax, and where such returns cover the entire period involved and show the items of gross income, deductions and credits of the taxpayer with such definiteness as to permit an assessment of the tax if accepted as correct, even though such returns were filed prior to the passage of the Revenue Act of 1918 on February 24, 1919 and amended returns were filed, under Treasury Decision 2797, showing additional taxes due for the fiscal year ended March 31, 1918 under the Revenue Act of 1918, and even though further additional taxes are found by the Commissioner to be due for said year on account of the correction of some items appearing on both the original and amended returns.

2. A purported waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes, executed by a taxpayer at a time when, unknown to him, the statutory period has expired and the taxpayer has thereby acquired a complete defense and immunity from such an assessment and collection, is invalid and affords no legal defense to the taxpayer's action to recover taxes assessed or collected after the statutory period.

3. A taxpayer, who executes such a waiver in favor of the Government after the statute of limitations had expired, at the request of a Government officer or agent, and upon the false representation by such officer or agent that the statute of limitations has not yet expired, is entitled in equity to relief against the use of such a waiver as a

defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

4. Where a taxpayer executes and files such a waiver with the Government as a consequence of a mutual mistake as to the expiration of the statute of limitations, [fol. 120] both the taxpayer and the officers or agents of the Government with whom he deals mistakenly believing that the statute has not yet expired, the taxpayer is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

5. The president of a taxpayer corporation has no implied or apparent authority to execute, on behalf of his corporation, a waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes after the statutory period has already expired; and, where such officer undertakes to execute such a waiver under such circumstances, in ignorance of the expiration of the statutory period, the purported waiver is invalid and affords no legal defense to the corporation's action to recover taxes assessed or collected after the statutory period.

Thereafter, within the time allowed by the Court at the trial of the case, to-wit, on November 28, 1932, Plaintiff filed its motion for judgment, in the following form:

PLAINTIFF'S MOTION FOR JUDGMENT

"Now comes the Plaintiff and makes this its motion, based upon the pleadings and evidence introduced herein,

"(1) That the Court adjudge and decree that the purported waivers relied upon by the Defendant are void and may not be used as a defense in this action, and

"(2) That the Court order and adjudge that Plaintiff have and recover judgment against the Defendant in the principal sum of $57,265.76, with interest from October 15, 1926, as provided by law.

"Dated November 26, 1932.

Respectfully submitted, Horace L. Bomar, W. A. Sutherland, Attorneys for Plaintiff."

[fol. 121] And thereupon the Court took the case under advisement.

At the time of handing down its opinion, findings of fact and conclusions of law, the Court ordered and directed that both sides be allowed a reasonable time for noting exceptions and having the same allowed with reference to the Court's findings of fact and conclusions of law and the parties' requests for findings of fact and conclusions of law.

Thereafter, to-wit, on April 24, 1933, within the time allowed by the Court, and as agreed to by counsel for both sides, Plaintiff noted and took its exceptions to certain of the Court's findings of fact and conclusions of law and to the failure of the Court to make certain findings of fact and conclusions of law requested by Plaintiff, and said exceptions were allowed, in the following form, to-wit:

PLAINTIFF'S EXCEPTIONS TO CONCLUSIONS OF LAW AND FACTS

1. Plaintiff excepts to the failure of the Court to find specially that the returns filed on May 28, 1918, for the fiscal year ended March 31, 1918, consisted of an income tax return on Form 1031 and an excess profits tax return on Form 1103, both of which were duly executed and verified by Plaintiff, said exception being taken upon the ground that such a finding is required by the undisputed evidence and admissions made in the pleadings.

2. Plaintiff excepts to the failure of the Court to find specially that the principal information which was contained in the income tax return, on Form 1031, referred to in Paragraph 1 above, is the same information which was set forth in Exhibit A attached to the petition in this case, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

3. Plaintiff excepts to the failure of the Court to find specially that the principal information which was con-
[fol. 122] tained in the excess profits tax return, on Form

1103, referred to in Paragraph 1 above, was the same information which was set forth in Exhibit B attached to the petition in this case, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

4. Plaintiff excepts to the failure of the Court to find specially that the return filed by Plaintiff on April 29, 1919, for the fiscal year ended March 31, 1918, was on Form 1120, and was filed with the Collector of Internal Revenue for the District of South Carolina, and that this return was an income and excess profits tax return for said period, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

5. Plaintiff excepts to the failure of the Court to find specially that the return on Form 1120, filed on April 29, 1919, referred to above, contained the same information with reference to the amount of net income and invested capital for the pre-war years (1911, 1912 and 1913), and the same information with reference to the amount of invested capital for the fiscal year ended March 31, 1918, as was contained in the original income and excess profits tax return on Form 1031 and Form 1103, referred to above, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

6. Plaintiff excepts to the failure of the Court to find specially that the amount of net income for the taxable year, the fiscal year ended March 31, 1918, was shown in the return on Form 1120 to be the sum of $652,402.72, which sum was also shown to be the amount of net income subject to excess profits tax in the excess profits tax return on Form 1103, referred to above, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

7. Plaintiff excepts to the failure of the Court to find specially that the total net income shown to be subject to income tax on the income tax return on Form 1031, referred to above, was $652,525.30, which amount ex- [fol. 123] ceeded the amount shown as taxable net income

in the additional or amended return on Form 1120, referred to above, by the sum of $122.58, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

8. Plaintiff excepts to the failure of the Court to find specially that both the original income tax return on Form 1031 and the original excess profits tax return on Form 1103 disclosed that the sum of $122.58 had been paid by Plaintiff during the fiscal year ended March 31, 1918, as interest on an indebtedness incurred for the purchase of obligations of the United States, and that this amount was deducted from net income for the taxable year as shown in the original income tax return on Form 1031 in order to arrive at the amount of net income subject to excess profits tax, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

9. Plaintiff excepts to the failure of the Court to find specially that the additional or amended return on Form 1120 showed an additional tax of $50,638.75 over and above the taxes shown on the original income and excess profits tax returns, which additional tax resulted solely from the application of the revised rates provided by the Revenue Act of 1918, which was enacted after the original returns were filed, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

10. Plaintiff excepts to the failure of the Court to find specially that the original income and excess profits tax returns on Forms 1031 and 1103 respectively, referred to above, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912 and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918 and the Revenue Act of 1917, and the [fol. 124] Revenue Act of 1916 as amended, provided that the items referred to had been accepted by the Commis-

sioner as correct, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

11. Plaintiff excepts to the failure of the Court to find specially that the additional or amended income and excess profits tax return on Form 1120, referred to above, did not contain any further information, in addition to the information disclosed in the original returns on Forms 1031 and 1103 respectively, which would enable the Commissioner of Internal Revenue to make a more accurate determination of computation of Plaintiff's income and excess profits taxes under the Revenue Act of 1918, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

12. Plaintiff excepts to the failure of the Court to find specially that all of the information disclosed in the additional or amended return on Form 1120, which could be used for the computation of income and excess profits taxes under the Revenue Act of 1918 had already been disclosed in the original income and excess profits tax returns on Forms 1031 and 1103 respectively, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

13. Plaintiff excepts to the failure of the Court to find specially that the original income and excess profits tax returns on Forms 1031 and 1103 respectively, were prepared and filed by Plaintiff in good faith and in the honest belief that all of the information therein contained was correct, said exception being taken on the ground that said finding is required by the undisputed evidence.

14. Plaintiff excepts to the failure of the Court to find specially that the additional income and excess profits taxes paid by Plaintiff on June 16, 1919, were in the sum of $3,762.86, said exception being taken on the ground that such finding is required by the admission made in paragraph 19 of Defendant's answer.

[fol. 125] 15. Plaintiff excepts to the failure of the Court to find specially that each of the waivers referred to in the findings of fact were requested of Plaintiff by the Commissioner of Internal Revenue or his Agent upon the repre-

sentation that at the time of the request the statute of limitations (or the statute as extended by prior waivers) for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired, and that said representations were false and misleading, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

16. Plaintiff excepts to the failure of the Court to find specially that the representations referred to in the preceding paragraph were made with the intention and purpose of causing Plaintiff to execute the waivers requested at the time said representations were made, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

17. Plaintiff excepts to the failure of the Court to find specially that at the time of the execution of each of the purported waivers referred to in the findings of fact, Plaintiff did not know that the statute of limitations had already expired and that any preceding waivers were invalid, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

18. Plaintiff excepts to the failure of the Court to find specially that each of the purported waivers referred to in the findings of fact was executed under a mutual mistake as to the expiration of the statute of limitations, or the statute as extended by prior waivers, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

19. Plaintiff excepts to the failure of the Court to find specially that Plaintiff's President and Treasurer, J. C. Evins, would not have undertaken to execute any of the so-called waivers referred to in the findings of fact, but for the representation of the Commissioner or his Agents to the effect that the statute of limitations (or the statute as extended by prior waivers) had not yet expired, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

[fol. 126] 20. Plaintiff excepts to the failure of the Court to find specially that Plaintiff's President and Treasurer, J. C. Evins, would not have undertaken to execute any of the so-called waivers referred to in the findings of fact,

but for a mutual mistake, under which the representatives of the Government and the Plaintiff labored, to the effect that the statute of limitations had not yet expired at the time each of said purported waivers was executed, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

21. Plaintiff excepts to the failure of the Court to find specially that the execution of each of the purported waivers referred to in the findings of fact resulted solely and proximately from misrepresentations made by the Government Agents, and mutual mistake, under which the representatives of the Government and the Plaintiff labored, to the effect that the statute of limitations had not yet expired when each of said waivers was executed, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

22. Plaintiff excepts to the failure of the Court to find specially that as a result of the purported execution of each of the waivers referred to in the findings of fact, Plaintiff received no consideration, benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistake, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

23. Plaintiff excepts to the failure of the Court to find specially that Plaintiff did not discover the falsity of any of the representations under which any of the purported waivers referred to in the findings of fact were procured, and that Plaintiff did not become aware of the mutual mistakes under which the Government and Plaintiff labored with reference to the expiration of the statute of limitations, and the invalidity of prior waivers, until after the signing and filing by Plaintiff's President and Treasurer, J. C. Evins, of the last of the purported waivers referred to in the findings of fact, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

[fol. 127] 24. Plaintiff excepts to the failure of the Court to find specially that Plaintiff's President and Treasurer, J. C. Evins, had no authority to execute, on behalf of Plaintiff, a waiver of the statute of limitations on assessment

and collection of income and profits taxes after the expiration of the period of limitation provided in the statute, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

25. Plaintiff excepts to the Court's finding as a fact that there was no such misrepresentation, mutual mistake or lack of authority as to invalidate the waivers, even if signed after the expiration of the statutory period, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

26. Plaintiff excepts to the Court's finding that "If a mistake existed, it was a mistake principally as to a question of law, of which both sides are presumed to have had knowledge, and one side was as familiar with the facts as the other", said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

27. Plaintiff excepts to the Court's finding that the waivers signed by Plaintiff's President and Treasurer were valid and binding upon the corporation, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

28. Plaintiff excepts to the Court's finding that the original income and excess profits tax returns on Forms 1031 and 1103, respectively, contained insufficient information for the proper determination of the amount of taxes to be assessed under the Revenue Act of 1918, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

29. Plaintiff excepts to the Court's finding that the [fol. 128] original income and excess profits tax returns on Forms 1031 and 1103, respectively, were merely tentative returns, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

30. Plaintiff excepts to the Court's finding that plaintiff ratified the authority of its President and Treasurer

in executing the purported waivers referred to in the findings of fact, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

31. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that the period of limitation on the assessment and collection of additional income and excess profits taxes, provided in Section 250 (d) of the Revenue Act of 1921, Section 277 (a) (2) of the Revenue Act of 1924, and Section 277 (a) (3) of the Revenue Act of 1926 begins to run, with respect to a fiscal year ended March 31, 1918, upon the filing of the original income and profits tax returns for that year, where such returns are made in good faith and without fraud or intent to evade the tax, and where such returns cover the entire period involved and show the items of gross income, deductions and credits of the taxpayer with such definiteness as to permit an assessment of the tax if accepted as correct, even though such returns were filed prior to the passage of the Revenue Act of 1918 on February 14, 1919, and amended returns were filed, under Treasury Decision 2797, showing additional taxes due for the fiscal year ended March 31, 1918, under the Revenue Act of 1918, and even though further additional taxes are found by the Commissioner to be due for said year on account of the correction of some items appearing on both the original and amended returns, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

32. Plaintiff excepts to the Court's ruling as a conclusion of law, that where income and profits tax returns for a fiscal year ending in 1918 were filed prior to the passage of the [fol. 129] Revenue Act of 1918, and where such returns were in complance with the provisions of the Revenue Act of 1917 which was in force at the time the returns were filed, and where additional returns were filed for the same period after the passage of the Revenue Act of 1918, the statute of limitations on the assessment and collection of income and excess profits taxes for said period began to run upon the filing of the additional returns after the passage of the Revenue Act of 1918, and not upon the original income and excess tax returns filed prior thereto, said conclusion being contrary to law.

33. Plaintiff excepts to the Court's ruling, as a conclusion of law, that the Revenue Act of 1918 requires the filing of additional income and excess profits tax returns for a fiscal year ending in 1918 as to which complete income and excess profits tax returns had already been filed in compliance with the provisions of the Revenue Act of 1917, said conclusion being contrary to law.

34. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that a purported waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes executed by a taxpayer at a time when, unknown to him, the statutory period has expired, is invalid and affords no legal defense to the taxpayer's action to recover taxes assessed or collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

35. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that a taxpayer, who executes such a waiver in favor of the Government after the statute of limitations has expired, at the request of a Government officer or agent, and upon the false representation by such officer or agent, that the statute of limitations has not yet expired, is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

[fol. 130] 36. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that where a taxpayer executes and files such a waiver with the Government as a consequence of a mutual mistake as to the expiration of the statute of limitations, both the taxpayer and the officers or agents of the Government with whom he deals mistakenly believing that the statute has not yet expired, the taxpayer is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recivery of taxes collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

37. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that the president of a taxpayer

corporation has no implied or apparent authority to execute, on behalf of his corporation, a waiver of the statute of limitations, on the assessment and collection of additional income and excess profits taxes after the statutory period has already expired, and that where such officer undertakes to execute such a waiver under such circumstances in ignorance of the expiration of the statutory period, the purported waiver is invalid and affords no legal defense to the corporation's action to recover taxes assessed or collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

38. Plaintiff excepts to the failure of the Court to make specific findings of fact and conclusions of law upon all questions and issues involved in this case, as required by Section 764 of Title 28 of the United States Code.

39. Plaintiff excepts to the failure of the Court to pass individually upon each of Plaintiff's requests for findings of fact and conclusions of law.

This 24th day of April, 1933.

Horace L. Bomar, W. A. Sutherland, Joseph B. Brennan, Attorneys and Solicitors for Plaintiff.

[fol. 131] ALLOWANCE OF EXCEPTIONS

The foregoing exceptions having been taken and noted within the time allowed by the Court and agreed to by both sides, said exceptions are hereby allowed.

This 24th day of April, 1933.

H. H. Watkins, United States Judge.

Thereafter, on April 24, 1933, the Court denied Plaintiff's motion for judgment heretofore filed, to which action of the Court Plaintiff objected and was then and there allowed an exception.

Thereafter, to-wit, on April 25, 1933, the Court entered judgment dismissing the complaint.

For as much as the matters above set forth do not fully appear of record, the Plaintiff tenders this its bill of exceptions and prays that the same may be signed and ap-

proved by the Judge of this Court, and Plaintiff prays further that in view of the equitable, as well as the legal, issue involved in this case this bill of exceptions be treated also as a statement of evidence under Equity Rule 75(b), and that it be approved and certified as such.

Dated April 25, 1933.

Horace L. Bomar, W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO BILL OF EXCEPTIONS

[fol. 132] It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing bill of exceptions contains all the evidence given and proceedings had on the trial of this case, and that it is correct in all respects, and that the same may be approved, allowed, settled and ordered filed, and made a part of the record herein by the Judge before whom this case was tried, upon the filing of this stipulation, without further or other notice to Defendant or its counsel.

And it is further stipulated and agreed that the foregoing bill of exceptions may be treated as a statement of evidence, and that as such said statement is a correct statement under paragraph B of Equity Rule 75, and the lodgment thereof in the Clerk's office for the examination of the Defendant, and notice of such lodgment and of the time when same will be presented to the Judge for approval, are hereby waived, and the same may be approved by the Judge at once.

This 25th day of April, 1932.

W. A. Sutherland, Joseph B. Brennan, Attorneys and Solicitors for Plaintiff. Joseph A. Tolbert, Attorneys and Solicitors for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER AND CERTIFICATE SETTING BILL OF EXCEPTIONS

The foregoing bill of exceptions was tendered this 25th day of April, 1933, within the time allowed by the rules of

this Court and at the term of this Court at which the judgment of April 25, 1933, was rendered. Said bill contains all the evidence given and proceedings had upon the trial of this action, said evidence being set forth in condensed and narrative form except where the form of question and answer is required for a proper understanding of the questions presented, and in such cases the form of question and answer has been directed by the Court, and said bill is in [fol. 133] all respects correct and is hereby approved, allowed and settled and made a part of the record herein. In view of the equitable issue involved in this case, the foregoing bill of exceptions is also approved as a sufficient statement of evidence under Equity Rule 75(b), it being certified hereby that said statement is true, complete and properly prepared and complies with said Rule.

This 25th day of April, 1933.

(Signed) H. H. Watkins, United States Judge.

In United States District Court

[Title omitted]

Order to Transmit Original Exhibits—Filed April 25, 1933

Upon motion of Plaintiff, with the consent of the Defendent, it appearing to be necessary and proper that the original papers introduced in evidence in this case as Defendant's Exhibits 1, 2 and 3 be inspected in the Circuit Court of Appeals for the Fourth Circuit in connection with the appeal of said case,

It is hereby ordered, pursuant to the provisions of Paragraph 4 of Rule 14 of the Rules of the Circuit Court of Appeals for the Fourth Circuit, that said exhibits in the original form in which they were introduced in evidence be transmitted as original papers to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, together with the transcript of the record in this case.

This 25th day of April, 1933.

(Signed) H. H. Watkins, United States Judge.

[fol. 134] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

Now comes the Plaintiff, Clifton Manufacturing Company, and files the following assignments of error, upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this Court entered on the 25th day of April, 1933.

1

The Court erred in failing and refusing to render judgment for the Plaintiff upon the uncontradicted evidence.

2

The Court erred in rendering judgment for the Defendant upon the facts found.

3

The Court erred in failing and refusing to render a decree for the cancellation of the purported waivers upon the uncontradicted evidence.

4

The Court erred in failing and refusing to render a decree for the cancellation of the purported waivers upon the facts found.

5

The Court erred in overruling and denying Plaintiff's motion for judgment.

6

The Court erred in overruling and denying Plaintiff's motion for a decree for the cancellation of the purported waivers.

[fol. 135] 7

The Court erred in failing to make specific findings of fact and conclusions of law upon all questions and issues involved in this case, as required by Section 764 of Title 28 of the United States Code.

8

The Court erred in failing to pass individually upon each of Plaintiff's requests for findings of fact and conclusions of law.

9

The Court erred in holding that the statute of limitations upon the assessment and collection of income and excess profits taxes for Plaintiff's fiscal year ending March 31, 1918, began to run upon the filing of Plaintiff's income and excess profits tax return on Form 1120 on April 29, 1919, and not upon the filing of Plaintiff's duly executed and verified original income and excess profits tax returns on Forms 1031 and 1103, respectively, on May 28, 1918.

10

The Court erred in failing to find specially that the original income and excess profits tax returns on Forms 1031 and 1103, filed by Plaintiff on May 28, 1918, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912 and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918, and the Revenue Act of 1917, and the Revenue Act of 1916 as amended, provided that the items referred to had been accepted by the Commissioner as correct.

11

The Court erred in failing to find specially that all of the information disclosed in the additional or amended [fol. 136] return on Form 1120, filed on April 29, 1919, which could be used for the computation of income and excess profits taxes under the Revenue Act of 1918 had already been disclosed in the original income and excess profits tax returns on Forms 1031 and 1103, respectively, filed on May 28, 1918.

12

The Court erred in ruling, as a conclusion of law, that the Revenue Act of 1918 requires the filing of additional

income and excess profits tax returns for a fiscal year ending in 1918 as to which complete income and excess profits tax returns had already been filed in compliance with the provisions of the Revenue Act of 1917.

13

The Court erred in finding that Plaintiff's original income and excess profits tax returns on Forms 1031 and 1103 respectively were merely tentative returns.

14

The Court erred in failing to find specially that the original income and excess profits tax returns on Forms 1031 and 1103, respectively, filed on May 28, 1918, were prepared and filed by Plaintiff in good faith and in the honest belief that all of the information therein contained was correct.

15

The Court erred in failing to find specially that each of the waivers referred to in the findings of fact was requested of Plaintiff by the Commissioner of Internal Revenue or his agents upon the false representation that at the time of the request the statute of limitations (or the statute as extended by prior waivers) for assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired.

16

The Court erred in failing to find specially that each of [fol. 137] the waivers referred to in the findings of fact was executed under a mutual mistake on the part of the Plaintiff and the Government, the Plaintiff and the agents of the Government with whom Plaintiff was dealing mistakenly believing that the statute of limitations (or the statute as extended by prior waivers) for assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired.

17

The Court erred in finding that "If a mistake existed, it was a mistake principally as to a question of law."

18

The Court erred in failing to find specially that the execution of each of the purported waivers referred to in the findings of fact resulted solely and proximately from the misrepresentations described above, and that none of said waivers would have been executed but for said misrepresentations.

19

The Court erred in failing to find specially that the execution of each of the purported waivers referred to in the findings of fact resulted solely and proximately from the mutual mistake described above, and that none of said waivers would have been executed but for said mutual mistake.

20

The Court erred in failing to find specially that at the time of the execution of each of the purported waivers referred to in the findings of fact, Plaintiff did not know that the statute of limitations had already expired, and did not know that any preceding waiver was invalid.

21

The Court erred in failing and refusing to rule that a purported waiver of the statute of limitations on the assessment and collection of additional income and excess [fol. 138] profits taxes executed by a taxpayer at a time when, unknown to him, the statutory period has expired, is invalid and affords no legal defense to the taxpayer's action to recover taxes assessed or collected after the statutory period.

22

The Court erred in failing and refusing to rule that a taxpayer, who executes such a waiver in favor of the Government after the statute of limitations has expired, at the request of a Government officer or agent, and upon the false representation by such officer or agent, that the statute of limitations has not yet expired, is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

23

The Court erred in failing and refusing to rule that where a taxpayer executes and files such a waiver with the Government as a consequence of a mutual mistake as to the expiration of the statute of limitations, both the taxpayer and the officers or agents of the Government with whom he deals mistakenly believing that the statute has not yet expired, the taxpayer is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

24

The Court erred in finding as a fact that "There was no such misrepresentation, mutual mistake or lack of authority as to invalidate the waivers, even if signed after the expiration of the statutory period."

25

The Court erred in holding that Plaintiff's President and Treasurer had authority to execute, on behalf of his corporation, a waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes after the statuory period had already expired.

[fol. 139] 26

The Court erred in finding that Plaintiff ratified the action of its President and Treasurer in executing the purported waivers referred to in the findings of fact.

Wherefore, Plaintiff prays that said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

This 26th day of April, 1933.

Horace L. Bomar, W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO PRINTING OF RECORD—Filed April 26, 1933

Pursuant to Section 3 of Rule 23 of the Rules of the Circuit Court of Appeals for the Fourth Circuit, the par-

ties to the above described cause, by their respective attorneys, hereby stipulate and agree that the following parts only of the transcript of record shall be printed in connection with the appeal of said cause to said Court:

(1) Petition or complaint, with all amendments thereto.
(2) Answer.
(3) Affidavit of Horace L. Bomar, attorney for Plaintiff, as to service of petition, together with acknowledgment thereon.
(4) Opinion of the District Court embracing conclusions of fact and law.
(4-a) Order for Judgment dated Jan. 31, 1933.
[fol. 140] (4-b) Order vacating Judgment (filed Feb. 2, 1933).
(5) Order and judgment of the District Court, dismissing the complaint, entered April 25, 1933.
(6) Bill of exceptions.
(7) Stipulation of counsel as to bill of exceptions.
(8) Certificate of the District Court allowing and certifying the bill of exceptions.
(9) Order of the District Court for the transmission of Defendant's Exhibits 1, 2 and 3 as original papers to the Circuit Court of Appeals.
(10) Assignment of error.
(11) Memorandum required by Section 7 of Rule 14 of the Rules of the Circuit Court of Appeals for the Fourth Circuit.
(12) This stipulation.

It is further stipulated and agreed that in so far as any equitable issues are involved in this case, the filing of this stipulation with the Clerk of the District Court may be considered a sufficient compliance with the requirement of Equity Rule 75 with respect to the service and filing of a præcipe, and the Clerk of the District Court is hereby requested by both parties to transmit to the Clerk of the Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, only the papers designated herein.

This 26th day of April, 1933.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff. Joseph A. Tolbert, Attorney for Defendant.

[fols. 141 & 142] IN UNITED STATES DISTRICT COURT

MEMORANDUM

(1) Petition for Appeal filed: Apr. 26, 1933;
(2) Appeal allowed: April 26, 1933;
(3) Copy of Order Allowing Appeal lodged for adverse party: Apr. 26, 1933;
(4) Appeal Bond: Dated: Apr. 26, 1933—Penalty $250.00—Obligors: Clifton Mfg. Co., principal; Fidelity & Deposit Co. of Maryland, Surety. Conditioned for: costs and damages.
(5) Citation: Dated Apr. 26, 1933; Return dated Apr. 26, 1933;

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 143] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3510

CLIFTON MANUFACTURING COMPANY, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville. At Law

DOCKET ENTRIES

May 12, 1933, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond and citation are certified up under section 7 of Rule 14.

Same day, the appearance of W. A. Sutherland is entered for the appellant.

Same day, the original exhibits (Defendant's 1, 2 and 3) are certified up.

May 16, 1933, the appearance of Joseph A. Tolbert, U. S. Attorney, is entered for the appellee.

[fol. 144] May 17, 1933, the appearance of W. F. Evans, Attorney, Bureau of Internal Revenue, is entered for the appellee.

Same day, the appearance of Joseph B. Brennan is entered for the appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLANT THAT PRINTING OF RECORD BE HELD IN ABEYANCE, ETC.—Filed May 20, 1933

The petition of Clifton Manufacturing Company, Appellant in the above entitled and numbered cause, respectfully represents:

1

The District Court of the United States for the Western District of South Carolina granted an appeal in the above entitled cause on April 26, 1933.

2

The citation therein was signed on April 26, 1933, and was made returnable within forty days from said date.

3

The principal question involved in this case is whether the statute of limitations upon additional assessments of income and excess profits taxes for a fiscal year ending in 1918 commences to run upon the filing of the first complete return for that year prior to the passage of the Revenue Act of 1918. This identical question is also involved in the case of Globe Excelsior Oak Tanning Co. vs. United States, in which case a petition for certiorari [fol. 145] to the Court of Claims was filed in the Supreme Court of the United States on April 27, 1933 (Docket No. 916). In the event that the Supreme Court grants the

petition for certiorari in that case and finally decides said question on the merits, adversely to this Petitioner's contentions, this Petitioner would want to dismiss its appeal herein without further proceedings. In order to avoid any unnecessary expense in connection with this case, Petitioner desires that the printing of the record in this case be held in abeyance until the Supreme Court acts finally in the case of Globe Excelsior Oak Tanning Co. vs. United States, referred to above.

Wherefore, Petitioner and Appellant pray that the printing of the record in this case be held in abeyance until the Supreme Court finally acts in the case of Globe Excelsior Oak Tanning Co. vs. United States, October Term, 1932, No. 916, and that the time for Appellant to take all other steps required by Section 1 of Rule 16 of the Rules of this Court be extended accordingly for a period of 10 days after the final decision of the Supreme Court in said case.

Dated May 17, 1933.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DIRECTING PRINTING OF RECORD TO BE HELD IN ABEYANCE—Filed May 20, 1933

Good cause appearing therefor, and upon motion of the Appellant in the above cause, it is hereby ordered by the undersigned, Senior Circuit Judge for the Fourth Circuit, that the printing of the record in the above entitled cause be held in abeyance until the Supreme Court acts finally in the case entitled Globe Excelsior Oak Tanning Co. vs. United States, now pending in said Court and docketed as [fol. 146] No. 916, October Term, 1932, and that the time for Appellant to take all other steps required by Section 1 of Rule 16 of the Rules of this Court, be extended accordingly for a period of 10 days after the final decision of the Supreme Court in said case.

This 20th day of May, 1933.

John J. Parker, United States Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DOCKET ENTRIES

October 27, 1933, twenty-five copies of the printed record are filed.

December 29, 1933, the appearance of Sewall Key, Special Assistant to the Attorney General, is entered for the appellee.

Same day, stipulation as to the time for the filing of the appellee's brief is filed.

January 5, 1934, the appearance of J. L. Monarch, Special Assistant to the Attorney General, is entered for the appellee.

Argument of Cause

January 5, 1934 (January Term, 1934), cause came on to be heard before Parker and Soper, Circuit Judges, and Chesnut, District Judge, and is argued by counsel and submitted.

[fol. 147] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3510

CLIFTON MANUFACTURING COMPANY, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville. At Law

(Argued January 5, 1934. Decided April 3, 1934)

Before Parker and Soper, Circuit Judges, and Chesnut, District Judge

W. A. Sutherland and Joseph B. Brennan (Jones, Evins, Powers & Jones and Sutherland, Tuttle and Brennan on

brief) for Appellant, and J. Louis Monarch, Special Assistant to the Attorney General (Sewall Key, Special Assistant to the Attorney General, and C. C. Wyche, U. S. Attorney, on brief) for Appellee.

PER CURIAM OPINION—Filed April 3, 1934

[fol. 148] PER CURIAM:

Clifton Manufacturing Company, a corporation, brought an action in the District Court under Section 24 (20) of the Judicial Code as amended by the Act of February 24, 1925, 43 Stat. 972, 28 U. S. C. A. 41, (20), for the refund of income and profit taxes assessed for the fiscal year ending March 31, 1918. For this fiscal year it filed a return on May 28, 1918, under the provisions of the Revenue Act of 1917, and subsequently paid the tax therein shown to be due. After the passage of the Revenue Act of 1918, approved February 24, 1919, the taxpayer filed on April 29, 1919, an additional return for the same period, showing an additional tax, which was also paid. Subsequently two additional assessments were made for the period involved, and paid under protest. The taxpayer's claim is that these assessments were made after the statute of limitations had barred the right of the commissioner to make them, and the Commissioner's answer is that on June 25, 1923, the taxpayer executed the first of a series of waivers which prevented the running of the statute. This date was more than five years after the filing of the first return on May 28, 1918—but within five years of the filing of the second return on April 29, 1919.

It is conceded that the taxpayer's right of recovery in the case depends upon whether the period of limitations ran from the filing of the first or from the filing of the second income tax return; and that if the period ran from the filing of the second return, the taxpayer has no right of action against the United States. We are in accord with the conclusion stated in the opinion of Judge Watkins in the District Court, 3 Fed. Supp. 508, cited with approval in the opinions of the United States Circuit Court of Appeals for the Ninth Circuit in Zellerbach Paper Company vs. Commissioner, — F. (2d) —, and National Paper Products Company vs. Commissioner, — F. (2d) —, filed February 28, 1934, that the period of limitations began to run

from the filing of the second return, and the judgment of the District Court is therefore affirmed.

[fol. 149] In United States Circuit Court of Appeals, Fourth Circuit

No. 3510

Clifton Manufacturing Company, Appellant,

versus

United States of America, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina

Judgment—Filed and Entered April 4, 1934

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

Morris A. Soper, U. S. Circuit Judge.

April 4, 1934.

[fol. 150] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 151] Supreme Court of the United States

Order Allowing Certiorari—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is

granted, and the case is assigned for argument immediately following Nos. 35 to 39, inclusive.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,774. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 146. Clifton Manufacturing Company, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 3, 1934. File No. 146, O. T., 1934.